TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~346.~~ 1145

THE STEAMSHIP JAVA, ETC., JAMES BURNS, JOHN BURNS, AND CHARLES McIVER, CLAIMANTS, APPELLANTS,

vs.

JUDD LINSEED AND SPERM OIL COMPANY, LIBELLANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 7, 1870.

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3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy,

Before the Honorable George F. Shepley, circuit judge.

JUDD LINSEED AND SPERM OIL COMPANY, libellants and appellants,
v.
STEAMSHIP "JAVA," CLAIMANTS, RESPONDENTS, and appellees.

4 The transcript of the record of the district court of the United States for said district, in said cause, is as follows, namely:

5 *Libel.*

UNITED STATES OF AMERICA,
District of Massachusetts:

At the district court of the United States, begun and holden at Boston, within and for the district of Massachusetts, on the second Tuesday (being the tenth day) of September, in the year of our Lord one thousand eight hundred and sixty-seven,

Before the Honorable John Lowell, judge.

THE JUDD LINSEED AND SPERM OIL COMPANY, libellants,
v.
THE STEAMSHIP "JAVA."

This libel was filed in court on the 26th day of December, A. D. 1866, and is as follows, viz:

MASSACHUSETTS, *ss.*, *December*, 1866.

THE STEAMSHIP "JAVA."—In admiralty.

To the Honorable John Lowell, judge of the United States for the district of Massachusetts:

The libel and complaint of the Judd Linseed and Sperm Oil Company against the steamship "Java" in a cause of collision, civil and maritime, alleges and propounds as follows:

First. That the libellants, at the time of the collision hereinafter named, were the owners of thirteen hundred and twenty-one bags of
6 linseed, on board a schooner called the "James McCloskey," on a voyage from Boston to New York.

Second. That the said schooner, with the said linseed on board, left the dock in Boston on the seventh day of November last, and was proceeding on her said voyage, and passing down one of the channels of Boston harbor, within the ebb and flow of the tide, and the maritime jurisdiction of this court, when she was run into by the said steamship "Java," which was, at the time, coming up the harbor. That the weather was clear at the time, the hour about one o'clock afternoon, the tide running moderately on the early ebb, and the wind rather fresh at

the southward and westward. That the said steamship was about abeam of the said schooner on the said schooner's starboard side, heading directly for her, and so steering that if she did not change her course at once, she would strike the said schooner on her starboard side considerably abaft of amidships. That the master of said schooner called out to the said steamship that she was coming into the schooner, and put his helm hard astarboard, as the only course he could take to avert the collision or diminish its force. That if he had put his helm aport, it would have increased the effects of a collision; and if he had made no change, he would not have improved the chances of escape, or of receiving a less injury. That said steamship caused this collision by not seasonably altering her course, and by not seasonably stopping and backing her machinery, and by her unusual and venturous navigation, or by one or more of said faults; and that the said schooner did not by any fault of hers cause or contribute to the said collision.

Third. That the said steamship broke in the side of the said schooner, so that the water came upon said linseed, and that the master was obliged to run her upon the flats of East Boston to prevent her sinking. That she lay on said flats, and was pumped out, and got into dock as soon as possible, and the said linseed taken from her, and the best care taken of the same; but it was too much injured to be sent forward, and was sold at public auction.

Fourth. That by reason of the said collision, the libellants, as owners of said linseed, have sustained losses and incurred liabilities to the amount of about seven thousand dollars, for which the libellants have a lien on the said steamship "Java."

7 Fifth. That the owners and agent of the said steamship "Java" have refused to pay the libellants for their said loss.

Sixth. That the said steamship "Java" is now lying in this port, within the jurisdiction of this court.

Seventh. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellants pray that process be issued for the arrest of said steamship "Java," and that all persons having any interest therein may be cited to appear and answer to the allegations of this libel; and that this court will pronounce in favor of the said libel, and that the damages of the libellants be decreed to be paid from the proceeds of said steamship "Java," with the costs of court and counsel fees, and that such other relief be granted to the libellants as they are entitled to receive.

L. S. DABNEY,
Proctor.

Summons to show cause.

Whereupon a summons issued, commanding the marshal to summon all persons interested in the said steamship "Java," (if they might be found in his precinct,) to appear before the district court of the United States, to be holden at Boston, within and for the Massachusetts district, on Friday, the 28th day of December, A. D. 1866, at ten o'clock a. m., then and there to show cause, if any they have, why admiralty process should not issue against said steamship "Java," as prayed for in said libel. Upon which the marshal made return as follows, viz:

BOSTON, *December* 27, 1866.

UNITED STATES OF AMERICA,
Massachusetts district, ss:

Pursuant hereunto, I this day summoned the within-named parties to appear as within directed, by giving in hand to William G. Russell a true and attested copy of this precept.

GEO. H. GORDON,
U. S. Marshal.

8 *Stipulation for costs.*

Then personally appeared Ives G. Bates, of Boston, in the district of Massachusetts, on behalf of James Burns and John Burns, both of Glasgow, Scotland, and Charles McIver, of Liverpool, England, and produced for sureties Thomas Groom, of Dorchester, and Frederick W. Prescott, of Brookline, both in said district of Massachusetts. And the said Bates, Groom, and Prescott submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of two hundred dollars, unto the said libellants, that the said Bates shall pay all costs and expenses which shall be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appellate court.

Stipulation to the action.

Then personally appeared Ives G. Bates, of Boston, in the district of Massachusetts, on behalf of James Burns and John Burns, of Glasgow, Scotland, and Charles McIver, of Liverpool, England, and produced for sureties Thomas Groom, of Dorchester, and Frederick W. Prescott, of Brookline. And the said Bates, Groom, and Prescott, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of ten thousand dollars, unto the said libellants, that the said Bates shall abide by all orders and decrees, interlocutory or final, of the court, and shall pay the amount of the final decree of the court, and all sums of money that he shall be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

9 *Answer.*

And on December 28, 1866, the following answer was filed in the clerk's office, viz:

DISTRICT COURT OF THE UNITED STATES, *Massachusetts, ss:*

December T., 1866.—In admiralty.

JUDD LINSEED & SPERM OIL COMPANY
v.
THE STEAMSHIP "JAVA."

To the Honorable John Lowell, judge of the district court of the United States for the district of Massachusetts:

And now James Burns and John Burns, of Glasgow, in Scotland, and Charles McIver, of Liverpool, in England, trustees of the British and

North American Royal Mail Steam Packet Company, by Ives G. Bates, of Boston, in said district, their authorized agent, intervening for their interest in the steamship "Java," appear before this honorable court, and for answer to the libel and complaint of the Judd Linseed and Sperm Oil Company against said steamship, allege and articulately propound as follows:

First. That the respondents are the true and *bona fide* owners of said steamship "Java," and that no other person or persons are owners thereof.

Second. As to the matters alleged in the first article of said libel, these respondents have no knowledge or information save that derived from said libel, and therefore neither admit nor deny, but leave the libellant to prove the same.

Third. As to the matters in the second article of said libel contained, these respondents admit that a collision took between the steamship "Java" and the schooner "James McCloskey," at the time and place therein alleged, and that the weather was clear, and the tide running at the ebb; but as to the other matters set forth in said second
10 article, these respondents allege that the same are therein falsely set forth in great part, and that the truth is as hereinafter particularly alleged, to wit:

That, on the 7th day of November last, said steamship "Java," a propeller of two thousand tons and upwards, being on a voyage from the port of Liverpool, in England, to the port of Boston, under the command of Edward R. Moodie, an able and experienced master, and in charge of Elbridge G. Martin, a competent and duly commissioned pilot of the port of Boston, with a full complement of officers and men, and a sufficient look-out watch, and in all respects fully equipped, was steaming up the harbor of Boston, bound for her dock at East Boston, in said harbor; that said steamship had no sails set, and at reaching the shoal called the lower middle shut off her steam to half speed, and reduced her speed to less than four knots per hour.

That there was lying at anchor in the channel up which said steamship was steering, directly in the course of said steamship for her dock, a large ship called the "George M. Barnard," with her head towards the northward and westward, and that at a distance of about a mile below said ship, the pilot of said steamship took his course so as to go inside said ship, and between said ship and the East Boston shore, such course being free and less encumbered with vessels than the course outside said ship.

That some time before coming up with said ship a schooner was discovered on the starboard bow of said steamship, coming down under full sail between said ship and the East Boston shore; and thereupon all steam was shut off, and the engines of said steamship were stopped to allow said schooner to pass down in safety, which she did, passing to the starboard of the "Java."

That said steamship then proceeded slowly, with steam still shut off, and engines stopped, until she came up with the stern of the said ship "George M. Barnard," and was passing diagonally by the same, when she suddenly discovered the schooner "James McCloskey," drifting down with the tide alongside the said ship, and a short distance off abeam from said ship, directly in the course of said steamship. That said schooner had her foresail only partly hoisted and no other sail set, and was under no steerage way or command. That a good look-out had been kept by the "Java" during the whole time she was coming
11 up the harbor, and that it was impossible for her to discover the

said schooner sooner than she was discovered, owing to the fact that the said "George M. Barnard" was interposed between her and said schooner.

That immediately upon discovering said schooner the helm of the "Java" was put hard to starboard, and her engines were reversed at full speed, and had made several revolutions backward before the collision occurred; and that all that was possible to be done was done on board the "Java" to avoid the collision. That the bow of the said steamship struck the starboard side of the said schooner abaft the main rigging. That at the time of the collision the speed of said steamship was so reduced as to be almost imperceptible, and was not equal to that of said schooner drifting with the tide.

That said collision occurred without fault or negligence on the part of those in charge of the "Java," and was not occasioned by her not seasonably altering her course, nor by her not seasonably stopping or backing her machinery, nor by her unusual or venturous navigation, as alleged in said second article of said libel; but that the same was occasioned by the unskilful management and gross carelessness of those in charge of said schooner, in allowing her to drift without being under steerage way or control, and without sail set, and concealed by said ship "George M. Barnard" into the way of said steamship, and in being wholly unprepared to keep out of the way of said steamship; and that if said schooner had been under sail, so as to have answered her helm, she might, by putting her helm to starboard, even after said schooner was discovered by said steamship, have avoided the collision. And the respondents, further answering, say that the said schooner could have discovered the approach of said steamship long before said steamship could discover the said schooner, and were bound so to have discovered said steamship, and to have used due care to keep out of her course, but neglected so to do.

And these respondents allege that, at the time of said collision, the wind was light and from the westward, or more northerly than west; and whether any hail was given to said steamship by those on board said schooner these respondents are ignorant; but they allege that any hail given at the time alleged in said libel would be wholly ineffectual.

Fourth. As to the matters alleged in the third and fourth
12 articles of said libel, these respondents have no knowledge save as derived from the said libel, and therefore require the libellants to make proof thereof.

Fifth. The respondents admit the allegations in the fifth and sixth articles of said libel contained.

Sixth. These respondents, further answering, say that, at the time of said collision, said steamship was in sole charge of Elbridge G. Martin, a duly commissioned pilot of the port of Boston, appointed and commissioned under the statutes of the commonwealth of Massachusetts; that said steamship was boarded by said pilot outside the lines established as the limits of the peculiar pilotage ground of said port, and that he there offered his services to pilot said steamship to her said port, and was the first pilot so offering his services, and that, by the statutes of said commonwealth in such case made and provided, said pilot was entitled to take charge of said steamship, and to pilot her to her port of destination, and to receive compensation therefor; and these respondents say that, from the time of boarding said steamship to and at the time of said collision, said pilot had sole charge and management of said steamship and of her course; and that if said collision

occurred by any fault or mismanagement of said steamer, or of any one in charge thereof, which these respondents deny, the same occurred solely by the fault of said pilot; and the respondents deny that they or the said steamship are in any way liable therefore.

Seventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court; in verification whereof the respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

Wherefore these respondents pray that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

IVES G. BATES, *Agent.*

W. G. RUSSELL,
Proctor for Respondents.

13 UNITED STATES OF AMERICA,
District of Massachusetts:

On this 28th day of December, A. D. 1866, personally appeared the above-named Ives G. Bates, and made oath that the foregoing statements subscribed by him, so far as they were within his own knowledge, were true, and so far as he had been informed of the same, he believed them to be true.

Before me,
[SEAL.] WINSLOW WARREN, JR.,
U. S. Commissioner.

This libel was entered at a special district court held on the twenty-sixth day of December, A. D. 1866, and thence was continued from time to time until this eighth day of October, A. D. 1867;] and now, after a full hearing of the cause, upon the facts proved and arguments of counsel and mature deliberation thereon had, the court doth order, adjudge, and decree that said libel do stand dismissed, with costs for the claimant taxed at

And on the fourteenth day of October, A. D. 1867, the libellants claimed an appeal as follows, viz:

THE "JAVA."

MASSACHUSETTS, *ss.*, *October*, 1867.

The libellants claim an appeal in the above cause from the final decision of the court, and pray that the same be allowed.

By their proctor,
L. S. DABNEY.

And thereupon the said appeal was allowed by the court.

I, S. E. Sprague, clerk of the district court of the United States for the district of Massachusetts, hereby certify that the foregoing is a transcript of the record of said court in said cause, made up pursuant to admiralty rule 53.

In witness whereof I have hereto subscribed my name and af-
[L. S.] fixed the seal of said court this twenty-first day of November, A. D. 1867.

Attest: S. E. SPRAGUE, *Clerk.*

13 *b* This cause was duly entered in this court at the October term, A. D. 1867, and thence was continued from term to term to this present term, when, to wit, November 29th, 1870, the following motion is filed, namely: The libellants come and move the court for leave to amend the fourth article of their libel in the above cause by increasing the amount of the damage therein alleged, from about seven thousand dollars to twelve thousand dollars; which motion is allowed by the court, and the court pronounce the following decree: This cause came on to be heard at the last May term of this court, A. D. 1870, the Honorable Nathan Clifford, associate justice, and the Honorable George F. Shepley, circuit judge, sitting, and was argued by counsel, and thence the cause was continued under advisement to this present term; and now, after
13 *c* mature deliberation thereon had, it is ordered, adjudged, and decreed by the court here, that the decree of the district court in this cause be and the same is hereby reversed; and it is further ordered that this cause be referred to John G. Stetson, esquire, clerk of this court, as assessor, to assess the damages sustained by the libellants, as alleged in their libel in this cause, and the said assessor reporting that he has assessed the damages sustained by the libellants as alleged in their said libel, in the sum of nine thousand six hundred and fifty-two dollars and twenty-five cents, it is ordered that the said report of the assessor be accepted and confirmed; and it is thereupon, to wit, November 29th, 1870, ordered, adjudged, and decreed that the said Judd Linseed and Sperm Oil Company, libellants, recover against the said steamship "Java"
13 *d* the sum of nine thousand six hundred and fifty-two dollars and twenty-five cents damages, and their costs of suit taxed at one thousand thirty-nine dollars and forty-seven cents; and it is further ordered, that if the said sum of nine thousand six hundred and fifty-two dollars and twenty-five cents and costs of suit, taxed as aforesaid, shall not be paid within ten days from the date of this decree, then and in such case execution is to issue against the stipulators in this cause; therefore, thereupon, in open court, an appeal was claimed in the words following:

JUDD LINSEED AND SPERM OIL COMPANY
v.
THE STEAMSHIP JAVA, JAMES BURNS, JOHN BURNS, and CHARLES McIVER, claimants and respondents.

The above-named respondents, conceiving themselves aggrieved by the final sentence or decree entered on the twenty-ninth day of
13 *e* November, 1870, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States, and pray that this, their appeal, may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the said Supreme Court.

JAMES BURNS,
JOHN BURNS,
CHARLES McIVER,
By W. G. RUSSELL,
Their Attorney.

WM. G. RUSSELL,
Proctor for Respondents.

And said claimants give good and sufficient security to prosecute

their said appeal to effect, and to answer all damages and costs if they fail to make their plea good, which security is approved by the court, and said appeal is accordingly allowed, to wit, November 29, 1870.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

13*f*

14 At the hearing of said cause in this circuit court, the following evidence was used, namely:

TESTIMONY FOR LIBELLANTS.

Deposition of Richard Matthews, taken Feb. 12, 1869, *before me, Chas. F Wolcott, notary public.*

Direct examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. Please state the number of years you have been at sea, and the capacities in which you have served; how many years as master, and in what classes of vessels.

Ans. I have been at sea about forty-two years in all capacities, master about thirty-five years. I have been in all classes of vessels. For the last twenty-eight years, or thereabouts, I have been master of ships; before that, of barks and brigs. By all classes, I don't mean steamers.

Int. 2. How long have you been in command of the Massachusetts school ships—how many in each?

Ans. Five years in the "Massachusetts," three in the "Barnard," the first of next May.

Int. 3. In November, 1866, at the time of this collision, were you on board? Was Mr. Blaney?

Ans. I was not on board; Mr. Blaney—I don't know—I think he wasn't.

Int. 4. How much of the year does your ship lie at anchor, and how much at her moorings, when in Boston upper harbor?

Ans. She lays at her moorings about seven months—cruising about five.

Int. 5. When cruising, you come to by your anchor, do you?

Ans. Yes, sir; we always slip our moorings in cruising season.

Int. 6. Please to describe the situation of your moorings, as near as you can, with reference to the harbor-master's line.

15 Ans. We placed our moorings southeast and northwest, as near East Boston as it would be safe to lie, to swing clear of the flats. I should suppose the moorings are a hundred and twenty fathoms inside the harbor master's line; we come to anchor between the moorings and the line, with about thirty fathoms of chain, so as to swing clear of both.

Int. 7. When swinging at your moorings, to a one hour's ebb, and moderate wind to the northwestward, about how near is your stern to the flats of Bird Island, and what water?

Ans. Two hundred feet inside of us she would ground at low water, drawing thirteen feet; that is, at low ebb. At one hour's ebb, there would be ten or eleven feet more water, at the same tides.

Int. 8. At one hour's ebb, and moderate breeze from the northwestward, are you parallel with the flats, or how far from that?

Ans. Parallel with the flats.

Int. 9. Would it, or not, be safe for you to have your moorings nearer to *to* the flats than they are?

Ans. It would be safe, but not expedient; there is no danger in grounding—soft mud.

Int. 10. Did you ever see a Cunard steamer go inside your vessel, when you were at your moorings?

(Objected to.)

Ans. I think, in 1867, one of their steamers went up—the winter of 1867, I think—I noticed particularly after this collision—it was the "China," I think; none before, to my knowledge.

Int. 11. Might it or not have been the "Cuba?"

Ans. Possibly. It was one of the steamers; I don't recollect which, for certain.

Int. 12. What kind of vessels go inside your ship, when at her moorings; I mean as to size and as to being light or deep loaded?

(Objected to.)

Ans. The smallest class of vessels go inside. Coasting steamers, Philadelphia and Baltimore steamers, generally go up that way when the way is clear; St. John's and Portland boats frequently.

Int. 13. Are those vessels you describe a light or deep draft, as they go inside you?

Ans. Small vessels go up loaded; I don't recollect a deep ship or heavy draft steamer going up.

16 Int. 14. Is all the ground inside the range of your ship, when at her moorings, permitted anchorage?

Ans. Yes. sir.

Int. Do, or not, many small vessels anchor inside you when you are at your moorings?

Ans. Yes, sir.

Int. 6. Do you know the "Java?"

Ans. Yes, sir.

Int. 17. In your judgment, is it or not safe with reference to collisions, for a Cunard screw steamer like the "Java" to go inside you at one hour's ebb? State the degree of risk, its nature and circumstances.

(Objected to.)

Ans. Under such circumstances, I shouldn't think it was unsafe. That is, if she came as near Bird Island flats as she could come, so as to see the opening clear, and come slow, with ebb tide. Under some circumstances, I should think it was unsafe, imprudent, and unseamanlike; in coming up in mid-channel, and taking a short turn across our stern, and rushing into the passage blindfolded, I should think was unsafe.

Int. 18. Please give your judgment on this case. Suppose the "Java" to be coming up the main channel, at one hour's ebb, and to go so far up as to bring your ship between her and the passage, so that she could not see a small vessel inside of yours, and then to put her helm aport, and make a line so as to clear your stern, and then go around up to her wharf; would that, or not, be prudent navigation for such a ship, with reference to small vessels that might be inside of you? Please give your judgment and your reasons for it.

(Objected to.)

Ans. As that is stated, I should say it was an imprudent operation. My reasons are, that frequently there are small vessels inside of us, and lighters, scows, boats, and such craft, of which our ships would break off the view.

Int. 19. Suppose the "Java," when passing the Upper Middle and

Governor's Island, should not see any vessels inside of you, and should then go on up the main channel until she came to the situation stated in the last question, would she have a right to assume that she
17 would meet none there, if she went inside of you, because she saw none there when below?

(Objected to.)

Ans. No, I presume not.

Int. 20. Suppose the "Java" to come up the main channel until she brought you so that she could not see the passage inside of you, and should slow, and port, and change her course, and run so as to clear your stern, and should be going about two knots, with an ebb tide, and should suddenly discover a schooner come out from your shelter, and then back her machinery, would there be any nautical objection to her at once letting go her anchor, the tide being ebb?

(Objected to.)

Ans. No, sir, not a particle.

Int. 21. In such a state of things as described in the last question, in your judgment, if a collision seemed inevitable otherwise, would it or not be good judgment to let go her anchor, as a means of avoiding a collision or lessening its force?

(Objected to.)

Ans. I should do so, certainly.

Cross-examination by W. G. Russell, esq., of counsel for respondents.
(All cross-interrogatories de bene.)

Cross-int. 1. Is it not a common thing for a steamer, in coming up Boston harbor, to be obliged to run close under and across the stern of a ship lying at anchor and tailing down stream?

Ans. No, I should think it was rather uncommon; ships as a general thing lay at anchor out of the channel; still, it may not be an uncommon thing, as loaded ships lie at anchor in the channel sometimes for a few hours, and a steamer may come up and run across their stern.

Cross-int. 2. Suppose the school ship lying at her moorings, the tide one hour ebb, and the wind west or north of west, and vessels at anchor ahead of and outside of her, how can a steamer coming up the harbor reach her dock at East Boston without crossing their stern or their bow?

Ans. She could come up by the flats, close to Bird Island Flats,
18 so as to nearly open her dock, and see if anything was in the way, and go up inside, going slowly. That is one way, but not the principal way. I should have gone up the main channel, up above where the small vessels are allowed to anchor, (they are not allowed to anchor above the dock,) and see no difficulty in getting to the dock. I should get in the best way I could. They have to take a tug to get to the dock.

Cross-int. 3. Examine the chart herewith produced, marked "A., W. W., jr.," and the course marked thereon. State whether the course there marked is one which you would consider unseamanlike or hazardous for a steamer to take, if she proceeded slowly, the wind being west, or north of west, the tide one hour ebb, there being several vessels at anchor ahead of the school ship, and no vessel visible at anchor or under way between the school ship and East Boston wharves?

(Objected to.)

Ans. No, sir. I should think there would be no danger, assuming

that to be the track, and the position of the school ship; it looks to me farther out than we lay.

Cross-int. 4. Suppose a single vessel under way, to be seen by the steamer between the school ship and the East Boston wharves, would that alter your opinion as to the danger of taking that course?

Ans. I should proceed with more caution, of course, as I saw difficulty in the way.

Cross-int. 5. You were examined as a witness at the former trial of this cause, were you not?

Ans. Yes, sir.

Cross-int. 6. I find in my minutes of your former testimony this statement: "Even if vessels were in the way, I should not think it venturesome to go three knots an hour. Even with liability to vessels coming in, I should not consider it venturesome to run at an angle of four points with the school ship at three knots an hour." State whether that statement is a correct statement of your testimony, and whether it agrees with your opinion at the present time.

(Objected to, as a statement by authority of counsel to the witness of his previous testimony.)

(Mr. Russell, after objection, offers to modify the question by making a supposed case instead of a direct statement.)

19 (Mr. Dana objects to the change because it has been once read to the witness as being his own testimony.)

Ans. I don't think it would be risky; of course, three knots means through the water on an ebb tide. I don't recollect what my former testimony was.

Cross-int. 7. In your answer to the seventeenth direct interrogatory, you speak of taking a short turn across your stern. State whether by that expression you refer to such a course as is shown in the chart "A., W. W., jr."

Ans. No, sir; I should not consider that a short turn.

Cross-int. 8. State whether a course from the point denoted by the letter H in the word CHANNEL in that chart to a point just astern of the school ship would be what you would call a short turn, or a venturesome and hazardous course.

Ans. It is not what I should call a short turn, neither a hazardous course.

Cross-int. 9. Answer the same question, placing the school ship where you suppose she ought to be placed upon said chart.

Ans. No, sir, I should not consider it a venturesome or hazardous course, going at three knots, on an ebb tide.

Cross-int. 10. You have stated that you have not commanded or served on board a steamer; is it not so?

Ans. Yes, sir.

Direct examination resumed by R. H. Dana, jr., of counsel for libellants:

Int. 22. In your answer to the sixth cross-interrogatory, do you assume that the steamer sees the vessels, having a clear view up the passage; or do you assume that the steamer goes into the passage unable to see the vessels by reason of your ship?

Ans. I supposed when I made that statement that they were seen; even if vessels were in the way, I should suppose they would see them over the ship or in the passage.

RICHARD MATTHEWS.

20 *Deposition of Asa Blaney, taken Feb. 12, 1869, before me, Charles F. Walcott, notary public.*

Direct-examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 1 Please give your name at length, and residence, and place of birth.

Ans. Asa Blaney; I live in Marblehead; I was born in Marblehead.

Int 2. How long have you followed the seas?

Ans. I first went to sea in 1851, sir, and have been following it off and on ever since.

Int. 3. In what capacities, and what classes of vessels?

Ans. First officer, second officer, seaman, and boy; in ships, barks, and schooners.

Int. 4. How long, and in what capacities, have you been on board the Massachusetts school ships?

Ans. I have been connected with the school ships since September, 1861; first, I was seaman, boatswain, second officer, first officer. I was rated first officer of the "George M. Barnard" in the early part of 1866.

Int. 5. Are you still first officer of the "George M. Barnard?"

Ans. Yes, sir.

Int. 6. During the time you have been in the school ships, have you all the time been on the Boston station?

Ans. Yes, sir.

Int. 7. What months of the year do you lie at your fixed moorings when in Boston?

Ans. We generally go to our moorings in October; some years we leave our moorings earlier than in others; we lie from October till April or May, some years, April, and some May.

Int. 8. At other months, where do you lie when in the upper harbor of Boston?

Ans. We lie a little outside of our moorings, so that we can just swing clear of them, generally; we lie as near our moorings as it is safe to lie.

21 Int. 9. Do you mean that you come to by your anchor at these times?

Ans. Yes, sir; we come to an anchor.

Int. 10. When you were at anchor, how near is your anchor usually to the channel?

Ans. So near that we can generally swing clear; so that when the wind is to the eastward, we need not swing out into the channel way.

Int. 11. Before November, 1866, did you ever see a Cunard steamer go inside of you when you lay at your moorings?

(Objected to, as incompetent.)

Ans. No, sir.

Int. 12. Would you, or not, be likely to notice it, if one did go inside and you were there?

(Objected to, as last.)

Ans. Yes, sir; I should notice it, if I were on deck, sir.

Int. 13. Have you seen a Cunard steamer go inside of you, when you were at your moorings, since November, 1866?

(Objected to, as last.)

Ans. No, sir, I have no recollections of it.

Int. 14. What is the practice of small vessels, or coasting schooners, as to going inside of you, when you are at your moorings?

(Objected to.)

Ans. Small vessels come up or go down inside of us occasionally.

Int. 15. Do or do not small vessels anchor between you and the East Boston flats, and how much?

(Objected to.)

Ans. Yes, sir; there is considerable anchoring on that side of the harbor for small vessels; maybe they wouldn't be exactly between us and the flats.

Int. 16. As a seaman, what is your judgment as to taking a screw steamer of the size of the "Java" inside of your ship, while at her moorings, with one hour's ebb?

(Objected to.)

Ans. I shouldn't wish to do it myself, sir.

Int. 17. Please to give your reasons?

(Objected to.)

22 Ans. Well, in the first place, the main channel is outside of us, sir; and the second reason, there are generally small vessels anchored in that way.

Int. 18. You have stated two reasons why you would not like to take a Cunard steamer inside the school ship: first, that the channel is outside; and second, that there are vessels at anchor inside. How is it with reference to the chance of the steamer meeting vessels under way inside of you?

(Objected to.)

Ans. Well, she is likely to meet small vessels, because small vessels go up and down inside of us.

Int. 19. If she should meet a small vessel inside of you, how would it be as to the chances of manœuvring the steamer so as to avoid her?

(Objected to.)

Ans. I don't really understand the question.

Int. 20. Would it, or not, in your judgment as a seaman, be difficult or hazardous for a Cunard screw steamer, going inside of you, to manœuvre so as to avoid a small vessel under way inside of you?

(Objected to.)

Ans. I should say it would.

Int. 21. Would it make a difference whether the Cunard screw steamer had a clear view up the passage all the way, or came up and turned, so as to put you between her and the inside passage?

(Objected to.)

Ans. If she had a clear passage, it wouldn't be so hazardous.

Int. 22. Do you know the Cunard steamer "Java?"

Ans. I've seen her.

Int. 23. Suppose there were no vessel at anchor inside of you, would it, or not, in your judgment, be safe to take her inside, if she could not see the passage until she came round your stern?

(Objected to.)

Ans. I shouldn't wish to.

Int. 24. If coming round in that manner she should suddenly find a small vessel going down inside of you, would there or not be danger of the "Java" running upon her, and how great?

(Objected to.)

23 Ans. I should think there would be danger. I couldn't say the amount of danger.

Cross-examination by W. G. Russell, esq., of counsel for respondents.

(All cross interrogatories de bene.)

Cross-int. 1 Are not the New York, Philadelphia, and Baltimore

steamers in the constant practice of going inside the school ship while at her mooring? And do not the eastern steamers pass inside daily?

Ans. The New York and Philadelphia boats go occasionally; the Baltimore boats, I have no reccollection of seeing those go inside; and occasionally an eastern steamer goes up inside.

Cross-int. 2. Do not the eastern steamers go down inside daily?

Ans. By inside you mean between the moorings and the flats? No, sir, they do not.

Cross-int. 3. Do they not usually come up inside?

Ans. Occasionally, not always.

Cross-int. 4. Do not vessels frequently anchor outside of your moorings, and to the westward of the school ship, as she lies at her moorings?

Ans. Yes, sir, to the westward; outside and westward are about the same thing.

Cross-int. 5. As you lie at your moorings, with the wind west or to the north of west, and the tide at the ebb, is it not common to have vessels at anchor ahead of you and outside of you?

Ans. Yes, sir.

Cross-int. 6. Suppose you were coming up Boston harbor in a steamer, and at the Upper Middle had a view between the school ship and the Cunard wharf, and found the passage there clear of vessels, and that in coming up by Slate Ledge Buoy you found the school ship lying as supposed in the last preceding question, and with vessels at anchor ahead of her and outside of her, and that one vessel under way had come into the inside passage, with the tide at one hour's ebb, and water enough, would you consider it hazardous to take the inside passage?

Ans. I should think I was doing wrong in running up and crossing the ship's stern, if I were in mid-channel.

Cross-int. 7. What risk would you consider that you would run?

24 Ans. Myself—I should consider that I wouldn't have water enough in some parts of it, going up through there.

Cross-int. 8. You testified at the former trial, did you not?

Ans. I did.

Cross-int. 9. Did you not then state that the steamer "Cuba," on her then last trip, passed up inside the school ship?

Ans. I don't remember, sir.

Cross-int. 10. Did she not do so?

Ans. Not if we were laying at our moorings.

Cross-int. 11. Did you not at that time testify that there is water enough for a Cunarder to go inside the school ship at her moorings "unless we tail in with the wind fresh from the southwest?"

Ans. I don't remember my testimony at that time; [but since then I have seen a New York steamer get ashore between us and the English steamer's wharf.]

(Part in brackets objected to as not responsive, by Mr. Russell.)

Cross-int. 12. What number of vessels of all classes go up and down outside the school ship as compared with the number that go inside?

Ans. Well, I shouldn't think that a quarter part went up and down inside of us.

Cross-int. 13. Should you say one-tenth as many go up and down inside as outside?

Ans. I should think more than that went up and down; but by that I don't mean to say that large loaded ships go up and down inside of us—occasionally there may be.

Direct examination resumed by Mr. Dana, for the libellants:

Int. 25. You have said you do not think a quarter part of all the vessels that go by you go inside of you. If that is so, what part of those that go inside are small vessels, or large vessels light?

(Objected to.)

Ans. Nearly all.

Int. 26. Is there or not a harbor-master's line, to the westward of which vessels are not permitted to anchor?

(Objected to.)

25 Ans. There is.

Int. 27. How near to this line are your moorings?

(Objected to.)

Ans. We anchor inside of this line, and with thirty fathoms of chain swing clear of the moorings and the line generally, so that, with the wind west, we shan't get on our moorings, or with the wind east over the line—that is what we try to do.

Int. 28. Is or not all the space between your moorings and Bird Island flats permitted by the rules and regulations as anchoring ground for vessels?

(Objected to.)

Ans. I think it is.

Int. 29. You have said that vessels often lie at anchor to the north and west of you, when you are at your moorings, and tide ebb. Do you mean that they lie beyond the harbor-master's line, or within it?

Ans. Occasionally outside, and he removes them in.

ASA BLANEY.

Deposition of William Jenkins, taken Feb. 13, 1869, before me, Charles F. Walcott, notary public.

Direct examination of R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. Please state your name, residence, and place of birth.

Ans. William Jenkins. West Barnstable is my residence and place of birth.

Int. 2. How long have you followed the seas?

Ans. About twenty years, sir.

Int. 3. In what capacities?

Ans. All the way up from boy to first officer.

Int. 4. Were you on board the school ship "George M. Barnard" in November, 1866, when the collision took place between the steamer "Java" and the schooner "J. McCloskey?"

Ans. Yes, sir.

Int. 5. In what capacity were you serving?

Ans. As second officer.

26 Int. 6. How long have you been on board her?

Ans. Over a year.

Int. 7. Are you now serving on the school ship "Massachusetts," and in what capacity?

Ans. Yes, sir; as second officer.

Int. 8. What hour of the day was the collision? How was the tide, and how did you lie?

Ans. Between twelve and one o'clock, in the daytime; it was ebb tide, I think one or two hours ebb. We lay tailing down the harbor.

Int. 9. Please to state, in your own way, all you saw of this collision, where you were, what you saw of each vessel, and all that was done.

Ans. I was on the spar deck when I first saw the "Java" coming up, and afterwards I saw the schooner coming off from one of the wharves at East Boston. A steam-tug had her in tow. After she got about half way off, or four or five ships' lengths off from us somewhere near there, the tug cast off, and it wasn't till then that I saw that the "Java" had changed her course from what it was when I saw her first. I noticed she had changed her course, so as to pass under our stern; the schooner at this time was making sail, and appeared to be intending to pass under our stern too. After the schooner had got her foresail about half way up, a man sung out that was hoisting the sail, (I ain't sure whether it was one man or more,) "There is a steamer coming into us." I think he told the man at the wheel to put his helm up, but, before she swung off enough, the "Java" was into her.

Int. 10. When you first saw the "Java," where was she, and how heading?

Ans. She was heading up the harbor, as I've usually seen her coming up to her dock, intending to pass on our port side.

Int. 11. As the schooner passed along, and before she put her helm up, how was she heading as regards your ship—parallel, or at an angle with you?

Ans. Angle.

Int. 12. Which way, and how much of an angle?

Ans. She was pointing just abaft the stern of our ship, so as to go clear of our stern. The angle between the starboard sides of the two vessels was a little over forty-five degrees.

27 Int. 13. Where did the schooner come from?

Ans. From one of the East Boston docks.

Int. 14. Did you see her leave that dock?

Ans. I see her after she hauled out. I don't know which dock it was.

Int. 15. When you first saw the schooner, was she on the port or starboard side of your head?

Ans. On the starboard side.

Int. 16. Do you remember the shears standing on one of the docks at that time?

Ans. Yes, sir, I know of the shears standing there.

Int. 17. As you then lay, were the shears and the Cunard dock on your starboard or port bow?

Ans. Starboard.

Int. 18. When the tug left the schooner, how did the schooner bear off your bow?

Ans. She bore four or five points, I think.

Int. 19. When the schooner put her helm to starboard, how much did she swing off before the "Java" hit her?

Ans. Well, some; I couldn't say how much. I noticed she swung off some.

Int. 20. Please state, as near as you can, how much she swung off.

Ans. I don't know how I can get to that.

Int. 21. I mean, do you think it was one, two, or six points, or how many? Only give your best judgment.

Ans. I don't know that it was any more than a quarter of a point, but from appearances she fell off some.

Int. 22. Where did the Cunard steamer strike her?

Ans. I think forward of the main rigging, on the starboard side.

Int. 23. Please place these two blocks, one for the "Java," and one for the schooner, to show at what angle the "Java" struck her.

(Objected to as incompetent, the position of the blocks not being subject to the inspection of the court.)

Ans. I have placed them as near as I can recollect.

Int. 24. At what angle have you placed them?

(Objected to.)

Ans. They are both of them at different angles, apparently. I
28 should think the angle of the "Java" was four or five points, and the angle of the schooner was less, if anything.

Int. 25. How many points are there to a right angle?

Ans. Eight.

Int. 26. Putting the blocks aside, and speaking irrespective of them, from your memory directly, please state at an angle of how many degrees the "Java" struck the schooner.

Ans. Do you mean the angle from our ship? (The magistrate explained to the witness that the angle referred to is the angle which the "Java" and schooner formed with one another; and the witness answered:) Well, about thirty-three degrees forty-five minutes; three points, I should think.

Int. 27. In your answer to the twenty-fourth interrogatory, did you refer to the angles of the steamer and schooner with each other, or of each with your ship?

(Objected to as incompetent and leading.)

Ans. To the steamer and schooner.

Int. 28. When did you first perceive that the steamer had changed her course, so as to pass under your stern, as you have said?

Ans. About the time the tug let go the schooner, I think.

Int. 29. Have you ever seen a Cunard steamer before this go between you and the flats, when you were at your moorings?

(Objected to.)

Ans. I never have.

Int. 30. How did the place of collision bear from your ship?

Ans. I should think three or four points in the quarter—starboard quarter.

Int. 31. How far off from your quarter, to the best of your judgment?

Ans. Half one ship's length; about one hundred feet.

Int. 32. Please state at what angle with your ship the "Java" was coming down, after she changed her course to pass under your stern, as you have said.

Ans. I should think nearly five points.

Int. 33. Could the "Java" have gone between you and the schooner?

Ans. I think not, sir.

29 Int. 34 At what rate was the "Java" going when she struck the schooner?

Ans. Two or three knots, I should think.

Int. 35. Was it, or not, right for the schooner to pay off toward the flats, when she saw the steamer?

Ans. It was.

Int. 36. Was there anything the schooner could have done besides that to avert or mitigate the collision?

Ans. I don't think there was.

Cross-examination by W. G. Russell, esq., of counsel for respondents:

Cross-int. 1. Had you ever seen the "Java" before the collision Was she ever in Boston before that time to your knowledge?

Ans. I had seen her before the collision; yes, sir. I was hasty there. I don't know that I ever had seen her in Boston; I think I had, though.

Cross-int. 2. How many times had she been here before that trip?

Ans. I don't know, sir.

Cross-int. 3. Do you recollect ever seeing her come up the harbor at any other time?

Ans. No, sir.

Cross-int 4. How far down the harbor was the "Java" when you first saw her before the collision?

Ans. A mile, or a mile and a half.

Cross-int. 5. Was she above or below the State Ledge Buoy? How far down the harbor is that buoy below the school-ship?

Ans. I didn't notice at the time. I couldn't say with any degree of accuracy how far down the buoy is.

Cross-int. 6. State, according to your best judgment of distances, how far the State Ledge Buoy is below the school-ship.

Ans. Two miles.

Cross-int. 7. How far astern of your vessel did the collision take place?

(Objected to, as assuming what is not proved.)

Ans. I said it was on the quarter, before.

Cross-int. 8. If you draw a line across the stern of your ship, and at a right angle with the line of the ship, on which side of that line did the collision take place?

Ans. It took place on the starboard quarter.

Cross-int. 9. Please answer the last preceding question.

(The eighth cross-interrogatory was read to the witness.)

Ans. I don't understand what you mean.

Cross-int. 10. When you say, in answer to the thirtieth direct interrogatory, that the place of collision bore three or four points on the starboard quarter, state what you mean by that answer.

Ans. I mean three or four points from parallel with the line of the ship.

Cross-int. 11. That angle of three or four points is the angle between the line drawn fore and aft the ship and the line drawn to the place of collision, is it not?

Ans. Yes, sir.

Cross-int. 12. Which of the two angles made by these two lines is the one you refer to—the one forward or the one aft?

Ans. I mean the left-hand one, facing aft.

Cross-int. 13. Is it the angle made with the line running forward, or with the line running aft?

Ans. The line running aft.

Cross-int. 14. Was the place of collision abreast of the quarter of your ship, or forward of that, or astern of that?

Ans. Astern.

Cross-int. 15. How far astern?

(Objected to, because the witness has once said it was not astern.)

Ans. Three or four points on her starboard quarter.

Cross-int. 16. How far astern in distance, not in direction?

(Objected to, as last.)

Ans. About a hundred feet.

Cross-int. 17. Your ship headed up the harbor, did she not?

Ans. Yes, sir.

Cross-int. 18. Suppose a line drawn across your ship's stern at a right angle with the line of your ship, did the collision take place above or below that line?

Ans. I should say it took place on the line.

Cross-int. 19. Now suppose a line drawn across the bow of your
31 ship, and at a right angle with the line of your ship. Was the schooner when the tug left her above or below the line so drawn?

Ans. Below.

Cross-int. 20. How far below?

Ans. I couldn't say.

Cross-int. 21. How far, according to your best judgment of distances, had the schooner moved from the time the tug left her to the time she was struck?

Ans. About four or five times our ship's length.

Cross-int. 22. And was she all that time heading in towards your stern?

Ans. I didn't notice.

Cross int. 23. Can you not tell from your knowledge of her course, whether it continued to be towards your stern or not?

Ans. It appeared to be passing by our stern.

Cross-int. 24. Did she at any time while you saw her, and before the blow, pay off so much as to bring her to a course parallel with the line of your ship?

Ans. No, sir.

Cross-int. 25. Did she, in your opinion, pay off one point, up to the time she was struck?

Ans. I couldn't say how much.

Cross-int. 26. (De bene esse.) Do not the New York, Baltimore, Philadelphia, and Eastern steamers frequently pass up and down inside the school-ship?

Ans. Yes, sir; I believe they do.

Cross-int. 27. (De bene.) How large are these New York boats?

Ans. Some of them are two thousand tons.

Direct examination resumed by R. H. Dana, jr., esq., of counsel for libellants:

Int. 37. If a person stood on your forecastle, when the tug cast off the schooner, how many points on your starboard bow would the schooner bear to him?

Ans. Nine or ten.

32 Cross-examination by W. G. Russell, esq., of counsel for respondents:

Cross-int. 28. If you were standing at the stern of your ship at the time of the collision, how many points on your quarter would the place of collision have been?

Ans. Six or seven.

WILLIAM JENKINS.

Deposition of John Pennington, taken Feb. 12, 1869, *before me, Cha's F. Walcott, notary public.*

Direct examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. What is your name? How long have you been to sea?

Ans. John Pennington. I have been to sea twenty-eight years; went in 1840.

Int. 2. In November, 1866, when the collision took place between the Cunard steamer "Java" and the schooner "J. McCloskey," were you on board the school-ship "George M. Barnard?"

Ans. Yes, sir.

Int. 3. In what capacity.

Ans. As third officer.

Int. 4. Are you still on board, and third officer.?

Ans. Yes, sir.

Int. 5. Was Captain Matthews on board at the time of the collision? Was Mr. Blaney?

Ans. Mr. Blaney was not on board. I am not positive whether Capt. Matthews was or not. Mr. Jenkins was; he was on deck at the time.

Int. 6. Please to state when you first saw the schooner; where she was, and what doing.

Ans. I first saw her when a little forward of our gangway, parallel with the ship's head, hoisting the foresail at the same time; it was about two-thirds of the way up, I suppose, as she was passing the gangway.

33 Int. 7. Did you see anything done on board the schooner after you saw her?

Ans. When I first perceived the steamer, I saw the schooner put her helm to starboard, and she answered her helm.

Int. 8. When and how did you first see the steamer?

Ans. Mr. Jenkins first saw her; he was taller than what I was, and could see more above the rail than I could; when he saw her, I went on the gangway, and witnessed them when they came together.

Int. 9. Do you mean that you saw the steamer before the schooner put her helm astarboard, or after?

Ans. After.

Int. 10. When the schooner put her helm astarboard, did any one on board of her make any cry or call, and what?

Ans. Well, they were affrighted when they saw the steamer, I suppose; but I don't know what their calls were.

Int. 11. When Mr. Jenkins saw the steamer, did he say anything? What?

(Objected to.)

Ans. I don't know what he did say at the time, except that he made use of this remark, "The steamer'll go into her." The schooner was going down all the time, and at this time was a little beyond the quarter.

Int. 12. Was the steamer coming up on a line with your ship, or angling with the line of your ship?

Ans. Angling.

Int. 13. Please to state how the three vessels headed and stood with reference to each other after Mr. Jenkins spoke, and when you first saw the steamer.

(The witness here placed three small pieces of wood, representing the three vessels, and, by agreement, the magistrate states the positions and angles.)

Ans. The witness said: When I first saw the steamer, I was on the starboard gangway, and, as near as I can judge, the bow of the steamer hadn't quite come up to the line of the school-ship. I should say she was one hundred and fifty to two hundred feet from our stern. (The witness put the blocks in such a position as to show that the steamer was crossing the line of the school-ship at an angle of about fifty degrees; that is, the angle between the port sides of the two steamers was

34 about one hundred and thirty degrees.) When I first saw the steamer, I think—I couldn't say positively—the schooner's stern was pretty near abreast of our stern, and she was heading off to the eastward toward the flats. I couldn't say whether a point and a half, or two, from the line of our vessel.

Int 14. Was the schooner under steerage-way? How do you know?

Ans. I should judge by the way she answered her helm, and by the speed of her going through the water.

Int. 15. When you saw the two vessels, was there anything the schooner could have done to avert the collision?

Ans. I don't think there was anything.

Int. 16. Could the steamer have gone between the schooner and your vessel?

Ans. Well, it would be very risky to do so; she'd have had to hit either the schooner or the "George M. Barnard," to get clear of it altogether, I think. I couldn't be positive whether she'd have hit the school-ship or not, but from where I was standing, it seemed as if she would.

Int. 17. Could she have made the necessary turn in season?

(Objected to.)

Ans. Well, I could not judge as to that.

Int. 18. Where did the steamer hit the schooner?

Ans. Abaft the starboard main rigging, within a foot or two of the rigging.

Int. 19. Explain what you mean by "parallel with the ship's head."

Ans. In a line with the vessel.

Int. 20. Did you ever see a Cunard boat go inside of the school-ship, when she was at her moorings?

(Objected to.)

Ans. No, sir.

Int. 21. How long had you been on board the school ship when this collision took place?

Ans. About eight months.

35 Cross-examination by W. G. Russell, esq., of counsel for respondents:

Cross-int. 1. From what you saw of the schooner did you judge that she put her helm hard to starboard as soon as she discovered the steamer?

Ans. I think she put the helm hard to starboard. I think she did.

Cross-int. 2. Did you judge that she made any change of helm after that, up to the time of the collision?

Ans. That I don't know; I should judge not.

Cross-int. 3. After you saw the steamer, did the schooner continue to mind her helm and to pay off to port?

Ans. She payed off; she was paying off and going gradually to the eastward, until the steamer struck her.

Cross-int. 4. How much did she pay off after you first saw the steamer?

Ans. I should judge a point and a half to two points.

Cross-int. 5. How far astern of your vessel was the schooner's stern, when the vessels struck, and how far on your starboard quarter was she then?

Ans. Well, I should suppose at the time they struck, she was two or three hundred feet from our quarter: I couldn't say within fifty feet. I was not in the stern, so that I could tell exactly. I didn't go abaft the gangway; she was, say one hundred feet astern of our vessel, I should judge from the position where I was.

Cross-int. 6. Did the steamer alter her heading after you first saw her, up to the time she struck? If so, how much, and in what direction?

Ans. I did not notice.

Cross-int. 7. Would you, or not, have noticed the change in the course of the steamer, if she had made any considerable change?

Ans. Well, I was not watching the steamer all the time; I was watching the schooner as well. I was not watching the steamer's head whether she altered her course or not.

Cross-int. 8. Did you not watch one as much as the other?

Ans. Not to have any opinion of her alterations; it seemed as if the steamer was coming right straight, from where I was standing; they may have altered her helm; I couldn't say that.

36 Cross-int. 9. Could you not have seen a change in the course of the steamer if she had made a change; if not, why not?

Ans. I could if I was on the after part, but from where I was I couldn't ascertain if she made any change, for I didn't see the steamer much before she came up to our quarter.

Cross-int. 10. Do you mean to say that if the steamer, between the time you first saw her and the time of the collision, had changed her heading by one and a half or two points, you would not have been able to discover it where you were?

Ans. Well, I couldn't discover it from where I was, because she was so near up to our quarter when I perceived her. I don't think if there had been any alteration in her course I could have perceived it from where I was standing.

Cross-int. 11. Do you mean that she could have headed two points more in either direction, without you knowing it, where you were standing?

Ans. Well, she could have done so, but then I didn't notice it. I wasn't noticing it. I think if I'd been noticing it at the time I might have seen it, but I did not notice it. I was looking more at the schooner as she was a small vessel—looking from one to the other.

Cross-int. 12. How far did the steamer run after you first saw her?

Ans. She run to way on the starboard side, until she struck the schooner, I should say between two and three hundred feet, a vessel or a vessel and a half's length—I mean a medium size vessel.

Cross-int. 13. Did Mr. Jenkins call out to you as soon as he saw the steamer?

Ans. He didn't call out to me; I was standing close by him at the time; he was walking, as an officer always does, between the companion-way and the gangway I was close by the gangway. He saw her first and said, "My God! there comes a steamer across the stern," or something to that effect.

Cross-int. 14. What did Mr. Jenkins do after he said this, and what did you do?

Ans. We were both on the gangway at the time. I was in the gangway all the time after I perceived the steamer.

37 Cross-int. 15. Did Mr. Jenkins remain in the gangway with you to watch the vessels?

Ans. He and I were watching the vessels; he and I were in the gangway at the time I first saw the steamer; he may have gone off; I forget whether he did or not.

Cross-int. 16. Do I understand you to say that he was between the companion-way and gangway, when he first discovered the steamer and spoke to you?

Ans. Well, he discovered it first, but just where he was when he saw it I am not positive. I am not positive whether he was walking there, or whether he was standing nearer one side or the other, when he saw it. We were within speaking distance.

Cross-int. 17. And he spoke at once to you of her, did he not?

Ans. He spoke of the steamer coming across our stern; he was the first to mention it.

Cross-int. 18. You testified at the former trial of this case, did you not?

Ans. Yes, sir.

Cross-int. 19. Were you then called on to state the angle which the steamer made with your vessel in coming up with her?

Ans. Well, I believe as near as I can judge, I then gave it as I gave it now.

Cross-int. 20. Are you confident of that?

Ans. Well, I could not swear to it; it may have varied a little in my own recollection; varied a trifle. I didn't impress the matter particularly on my mind, not since my first evidence.

Cross-int. 21. Can you swear that you gave it within six points of what you now state it to have been?

Ans. I can swear to that.

Cross-int. 22. Did you not then state it to be at such an angle as to leave an angle of about forty degrees between the larboard side of the steamer and the starboard side of the school-ship?

Ans. I can't answer that question particularly, but as near as my recollection goes, I stated this time as the last.

Cross-int. 23. Can you positively swear that you now state the angle within four points of what you before stated it?

38 Ans. Yes, sir, I think I could.

Cross-int. 24. Within two points?

Ans. I think I could speak within two points, I am not positive of it. It's two years ago now, and I can't be positive about it.

Cross-int. 25. You were more likely to be right two years ago than now, were you not?

Ans. I don't think I've varied much in my statements, according to my memory.

JOHN PENNINGTON.

Deposition of Horace Nickerson, taken Feb. 18, 1869, *before me, Cha's F. Wolcott, notary public.*

Direct examination of R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. Please state your name and residence, and how long you have been to sea.

Ans. Horace Nickerson, South Dennis; I have been to sea ever since I was nine years old. I am forty-five years old.

Int. 2. What classes of vessels have you been in, and in what trade?

Ans. I have been in schooners about all the time; coasting—sailing out of Boston.

Int. 3. How long as master, and of what classes of vessels?

Ans. I have been twenty years master; schooners.

Int. 4. How much of the time since you have been master have you sailed out of Boston?

Ans. All the time.

Int. 5. Do you remember the collision of the steamer "Java" with the schooner "James McCloskey?"

Ans. Yes, sir.

Int. 6. Where were you then, and how came you to be there?

Int. I was standing on the end of Central Wharf, looking out for my vessel dropping down through the bridge; she was coming from the South End to Central Wharf.

Int. 7. Do you know the "James McCloskey?" How long have you known her?

Ans. I have known her ever since she was new; where she was built, and so forth.

Int. 8. How is she as to being quick or slow in minding her helm, and in her motions?

Ans. Well, she is called a very good working vessel, remarkable. When I say that, I mean among common coasting vessels. She is accounted very good indeed.

Int. 9. Please state what you saw of her that day. Where was she, and how and in what direction did she go?

Ans. Well, the first I saw, the steamer had just started her from the wharf, towing of her out to make sail. She was passing down inside the school-ship, or passing that way, when I saw the collision.

Int. Did you see the "Java?" State where, and what called your attention to her.

Ans. I saw her coming up the harbor. I saw her when she altered her course to go under the stern of the school-ship.

Int. 11. As you first saw her, how was she going as to the school-ship—to port or to starboard?

Ans. To port.

Int. 12. How many times have you seen a Cunard steamer coming up or going down the harbor?

Ans. Well, I've seen them ever since they run here, about; I've always seen them, going up and down, since they've been here—I can't say how long—and noticed them. I have seen them docking them, and all that sort of thing.

Int. 13. Have you ever seen one go inside the school-ship when at her moorings?

Ans. No, sir; not one. I never saw any steamer except a tug-boat.

Int. 14. How was the tide at this time?

Ans. Well, I should judge from an hour to two hours' ebb. I couldn't exactly tell, but as my vessel came down I should judge an hour to two hours' ebb—we had to drop through four bridges—it may have been a little more.

Int. 15. Which way was the wind, and how strong?

Ans. Well, I should think the wind was somewhere west south-
40 west to southwest. It was a beam wind, a free wind for a vessel to go down the harbor. Well, there was probably a three or four knot breeze.

Int. 16. Was your attention attracted to the change in the course of the "Java," and why?

Ans. Because I thought he ought to have kept his course on up, and not to have altered it as he did, as the channel is always kept open for vessels to pass to the port of the school-ship. That's the way I always understand it, as I come into port. I ain't allowed to anchor inside the school-ship, or in that range rather.

Int. 17. Did you see anything to cause or induce him to change this course from outside to inside the school-ship?

Ans. No, sir; I did not.

Int. 18. Did you see any vessels above the school-ship, or between her and the Cunard dock, to interfere materially with the "Java's" going that way?

(Objected to.)

Ans. I think there was one or two at anchor up that way, one or two

small vessels, if I recollect right. (To question repeated.) I saw the "McCloskey" going down there, which would be in the way, of course.

Int. 19. I mean to interfere with the "Java's" going to the port of the school-ship?

Ans. I should think they would; it ain't a proper place for a steamer to go, in my opinion. I wouldn't go there with my vessel, drawing twelve feet of water. I never went there but once, and then I asked the officer of the deck what those buoys were on. I didn't think there was any room to work a vessel between the school-ship and the flats; but light, I go down there anyway; that is, with a leading wind.

Int. 20. Which side of the school-ship are you now speaking of?

Ans. I mean going to the starboard of her; that is, when she lays stern down the stream.

Int. 21. The eighteenth interrogatory being read to you again, which side of the school-ship did you understand the words "that way" to mean?

(Objected to.) (The eighteenth int. was read to the witness.)

41 Ans. Why, to the port; she ought to have gone to the port.

Int. 22. Please attend to the reading of the seventeenth and eighteenth interrogatories, and answer carefully. How did the vessels there described prevent the "Java" keeping on the port side of the school-ship?

(The seventeenth and eighteenth ints. and answers were read to the witness.)

Ans. They didn't prevent her from keeping on the port side.

Int. 23. Please explain your answer to the eighteenth interrogatory. What did you mean by the "McCloskey" being in her way? Did you mean in her way to port or to starboard of the school-ship?

(Objected to as leading, and generally.)

Ans. I mean in her way to the starboard.

Int. 24. Were there any vessels at anchor or under way that would interfere with the "Java's" going on the port side of the school-ship to her dock?

(Objected to.)

Ans. No, sir; none at all.

Int. 25. Where were the one or two small vessels at anchor, which you have spoken of?

Ans. I should think they were about a third of the way from the ship to the wharves. When I say these vessels were at anchor, they were rather inside the range of her dock, pretty near on a line with it; a little inside, I should judge from appearances; pretty near on a line with her and the school-ship. I mean the vessels at anchor were on a line with the school-ship and the "Java's" wharf; a little inside; as nigh in the track as they could put 'em, I should think.

Int. 26. Were they in the way of the "Java" if she went to her dock, by the channel, to port of the school-ship; and how much?

Ans. No, sir; they were not in the way of her if she went to her dock, to the port of the school-ship, because there was plenty of room to turn or do anything.

Int. 27. Would they be in her way, if she went to the starboard of school-ship, and how much?

Ans. I should think they would; yes, sir, right in the way. She would have a chance to drop her anchor, or plenty of room to sheer either way, if she kept the channel; what I mean, she wouldn't

42 have a chance, if she went inside the school-ship, with them vessels there, to drop her anchor, or sheer.

Int. 28. If the "Java" went towards the starboard side of the school-ship, and before she got inside of her, was there, or not, anything to prevent her dropping her anchor astern of the school-ships?

(Objected to as incompetent.)

Ans. No, sir; there was nothing; she ought to have had an anchor ready at any moment, coming into port; that is a very necessary thing, having an anchor ready at any moment to let go; that is one of my positive orders, as soon as we pass Boston light to have everything ready to let got at a moment's warning; not only one, but both, as one may fail.

Int. 29. As you stood at the end of Central Wharf, did the dock the "McCloskey" left bear from you above the school-ship, or over her?

Ans. Above the school-ship. I could only just see the steam-tug, when she took her from the dock. Of course, the school-ship was a great way below her.

Int. 30. Did you see the tug let go of her?

Ans. Yes, sir.

Int. 31. Did the place where the tug let her go bear from you above the school-ship, or over her?

Ans. Above the school-ship—I mean up the river.

Int. 32. How long did you continue to see the "McCloskey?" Describe her course and appearance up to the collision.

Ans. Well, when he let go of him, he was probably—well, I should judge he was a thousand yards above the school-ship, with two-thirds of his foresail up, or something like that. She was passing to the starboard side of the school-ship; her course would have carried her to the starboard side, if nobody had interfered with her. According as she looked to me, she'd go twice or three times her length inside the school-ship, if nobody had come in collision with her. I saw her until she struck him—struck him in his port side about abreast of the main rigging, I should judge; I ain't positive. I never saw the blow, but should judge about the main rigging, somewhere.

(On the answer being read to the witness by the magistrate, he said, "Did I say port side? Starboard side I meant, starboard side.")

43 Int. 33. From you, as you stood, how did the place of collision bear as to the school-ship; above her, or below her, or over her?

Ans. It looked to me as if it was a little above her, from where I stood.

Int. 34. As seen from the school-ship herself, can you tell how the place of collision would bear from a person standing amidships on her, forward of beam, abaft beam, or how otherwise?

Ans. I should think it would bear a little forward of the beam, not far from that; that is, forming an opinion from where I stood.

Int. 35. Can you give an exact opinion as to that?

Ans. Well, I should think that was correct. If it was for my life, I couldn't say any different.

Int. 36. Did you know whether the schooner continued to hoist on her sail or not, after the tug left her? How much up was it when she struck?

Ans. Oh, yes, it was two-thirds of the way up; he was getting sail on his vessel as fast as he could—I wasn't there—I should judge. It was two-thirds of the way up when she struck, fully; enough to give a good way through the water with the breeze there was.

Int. 37. How was the wind for her then?

Ans. The wind was abeam, I should judge somewhere from west-south-

west to southwest, I can't remember exactly; a beam wind, any way, to go down the harbor with—that is, a free wind.

Int. 38. When the steamer turned to go to starboard of the school-ship, how near the school-ship was she as well as you can estimate?

Ans. Well, I should judge she was from three to five hundred yards; it may be more—a thousand perhaps; a thousand yards isn't but a little way on the water.

Int. 39. To what part of the school-ship did the "Java" head, after turning, or did she head below her stern?

Ans. She headed on her starboard quarter; that is, she turned to go on her starboard quarter.

Int. 40. Did she point near to the school-ship's starboard quarter, or full off from it?

Ans. She pointed a little off from it, enough to pass her.

Int. 41. Could you see, where you stood, whether the schooner changed her course at all?

44 Ans. She did not, I should judge.

Int. 42. I ask if you could determine that accurately from where you stood?

Ans. Yes, sir.

Int. 43. Did the "Java" change her course after the change you have described?

Ans. I should rather think she did, a very little. I won't be positive about that; I rather think she did, to head up stream more.

Int. 44. Was, or was not, the schooner under steerage-way at the time of the collision; and why do you say so?

Ans. Yes, sir; because she had a leading wind, and proper sail on her to give her steerage-way.

Cross-examination by W. G. Russell, esq., of counsel for respondents:

Cross-int. 1. You are a friend of Captain Crowell, are you not?

Ans. Well, I'm a neighbor to him, nothing more; he lives in one town and I in another.

Cross-int. 2. When did you last see him and where?

Ans. The last time I saw him was town meeting day; the second week in February; second Monday; a week ago last Monday; only to say, how do you do.

Cross-int. 3. You testified at the former trial of this case, did you not?

Ans. Well, I had something to say as a witness.

Cross-int. 4. You did not, at that trial, mention the one or two small vessels at anchor lying in the range of the school-ship and the deck of the "Java," did you?

Ans. I don't know but I did, and don't know as I did; it strikes me that I did, though; I think I did.

Cross-int 5. Are you not sure of it?

Ans. No, sir; I am not sure that I said there was, but I think I did.

Cross-int. 6. Do you recollect hearing them mentioned by any one else at that trial; if so, by whom?

Ans. I can't say that I heard anybody say.

Cross-int. 7. Were not those vessels in Capt. Crowell's way as he went down the inside passage?

Ans. No, sir.

45 Cross-int. 8. Did they not in any way interfere with his management of his vessel?

Ans. No, sir, because he had steam to carry him where he wanted to go, clear of them.

Cross-int. 9. Did he pass them while in tow of the tug?

Ans. Yes, sir; that's the way it looked to me.

Cross-int. 10. With whom have you conversed about those vessels at anchor since the former trial, or since the collision?

Ans. No one.

Cross-int. 11. When was your attention first called to the fact whether there were any such vessels there or not?

Ans. When I stood on Central Wharf there.

Cross-int. 12. When since that time?

(Objected to, as assuming a fact denied.)

Ans. I wouldn't like to answer that.

Cross-int. 13. Why not?

Ans. I've said I couldn't answer it.

Cross-int. 14. Why cannot you answer it?

Ans. I ain't nothing more to say on that question. I want to tell the truth and nothing but the truth, but I don't want to say anything to be caught in as meaning what I didn't say. Hadn't we better start fresh? You've got me all turned round now.

Cross-int. 15. I repeat the question. When, since the collision, was your attention first called to the fact whether there were any vessels at anchor in the line of the school-ship and the "Java's" wharf.

(Objected to, as assuming what is not proved.)

Ans. I told you, at the time when I was standing on the wharf.

Cross-int. 16. When since that time was it first called to your attention?

(Objected to, as assuming that it had been called to attention of the witness since the collision.)

Ans. I have nothing to say; I've answered it once. I don't know whether you mean what I've said in answer to Mr. Dana, which has been written down here. Nothing has been said to me outside.

Cross-int. 17. From the time of the collision to the time you
46 answered Mr. Dana's interrogatory in giving this deposition, has no one spoken to you about those vessels at anchor?

Ans. Not that I know of.

Cross-int. 18. Do you know that no one has spoken to you of them during that time?

Ans. I have answered all I've got to say in regard to them vessels.

Cross-int. 19. Please answer the last preceding question.

Ans. I've got nothing to say about those vessels; I've said all I shall say.

Cross-int. 20. Do you refuse to answer further about them?

Ans. Well, I might if I thought it was necessary in my evidence. All I can say, I supposed they were in the way; it looked so to me.

Cross-int. 21. Do you not now know whether any one has spoken to you on the subject of those vessels at anchor from the time of the collision to the time of your giving this deposition?

Ans. I have told you once. (To question repeated.) I don't know that they have.

Cross-int. 22. Do you know that they have not?

Ans. Well, haven't I answered it two or three times, that I didn't know that they had? May be I don't understand the meaning of your questions; I am willing to answer what I understand.

Cross-int. 23. Has not Captain Crowell spoken to you of those vessels at anchor since the collision?

Ans. I haven't talked with Captain Crowell about it at all.

Cross-int. 24. Has not Mr. Judah Baker spoken to you of those vessels since the collision?

Ans. No, sir; not to my knowledge.

Cross-int. 25. Are you sure he has not spoken to you of them?

Ans. Why, haven't I answered that once; ain't that plain English—"not to my knowledge?"

Cross-int. 26. When did you last see Mr. Judah Baker?

Ans. I see him about every day; that is, when I am in Boston.

Cross-int. 27. When did you last speak with him about this collision?

Ans. I couldn't tell you. I've scarcely talked with him.

Cross-*ans.* 28. From which side did the schooner "McCloskey's" sail fill, after the tug left her?

47 Ans. Her fore-boom was on the port side; that would be, the starboard tack would be aboard.

Cross-int. 29. Did it continue so to the time of the collision?

Ans. Yes, sir.

Cross-int. 30. At the time the tug left her, did the schooner head parallel with the line of the school-ship, or did her head point in towards the school-ship, or away from her?

Ans. Well, she was heading inside of her so as to pass clear of her. On a line with her would be head and head.

Cross-int. 31. Was she heading about for the stern of the school-ship?

Ans. I should think she was heading a little off from her stern.

Cross-int. 32. Was the line in which the schooner headed parallel with that in which the school-ship tailed, or did she head to the eastward of such a line, or how otherwise?

Ans. The two lines were about parallel, as near as I could judge.

Cross-int. 33. Did not the schooner pay off to port as she went down?

Ans. No, sir.

Cross-int. 34. Did you not testify at the former trial that when you first saw the "Java" she had the school-ship about one point on her starboard bow, as near as you could judge?

Ans. I think I did. Yes, I am pretty certain I did.

Cross-int. 35. That was so, was it not?

Ans. Yes, sir.

Cross-int. 36. Suppose a line drawn across the school-ship at her stern, and at a right angle with the line of the school-ship, was the schooner, at the moment of the collision, above or below that line?

Ans. I don't know that I rightly understand that. [On the question being explained to the witness by consent, he says,] above the line.

Cross-int. 37. Now draw another line at a right angle with the line of the school-ship, across her bow; was the schooner, at the time of the collision, above or below the line so drawn?

Ans. Well, it looked to me, from where I stood, as though she was above the line.

Cross-int. 38. If she had been below the line drawn as de-

48 scribed across the school-ship's stern, could you have seen her from where you stood?

Ans. I could have seen her in any position you put her, from where I stood, except just at the time the tug took her from the wharf. I mean I could see some portion of her body or masts. I call it seeing her if I can see her masts.

Cross-int. 39. Suppose she had been below the line, described as

drawn across the stern of the school-ship, could you have seen her hull at the time of the collision, from where you stood?

Ans. I won't say positive about that, but I could have seen the vessel, some portion of it; I think I could, though.

Cross-int. 40. How far from the nearest point of the school-ship was the nearest point of the schooner, at the moment of the collision?

Ans. I should think she was towards three hundred feet from her bow—pretty near on a line with her bow.

Cross-int. 41. The bow of the schooner was the nearest part to the school-ship, was it not, at the time of the collison?

Ans. Yes; that is, she was running her course down by the school-ship and her bow would be the nearest, of course; her stern would be up stream.

Cross-int. 42. And the bow of the school-ship was the point of the school-ship nearest to the schooner at the time of the collision, was it?

Ans. I think so; that is, her starboard bow.

Cross-int. 43. And the bow of the schooner was about abreast the bow of the school-ship at the time of the collision, was it not?

Ans. Well, I've answered that once. (To question repeated.) Well, somewhere near that, as I said before; the way it looked to me, you know.

Cross-int. 44. Then the bows of the two were, as near as you can judge, about three hundred feet apart at the time of the collision, were they not?

Ans. I should judge they were.

Cross-int. 45. What buoys did you enquire about of the officer on the deck of the school-ship, at the time you passed inside of her drawing twelve feet of water?

Ans. Two buoys that were abreast of her on her starboard side; she heading up stream.

49 Cross-int. 46. At what time of the year was this?

Ans. It was in the summer season, along toward the fall, I think.

Cross-int. 47. She was lying on her anchor, was she not?

Ans. Yes, sir.

Cross-int. 48. And those were her mooring buoys, were they not?

Ans. The officer told me they were the mooring buoys for the boats.

Cross-int. 49. Did you see her mooring buoys?

Ans. I believe she don't have any, if my memory serves me right.

Cross-int. 50. Why did you ask about those buoys?

Ans. Because I thought they lay in shoal water. I didn't think there was much room between the buoys and the ship. I was afraid to go to the eastward of them for fear of getting ashore; that was the reason I asked.

Cross-int. 51. What was the state of the tide at that time.

Ans. The tide was just ebb. That was the only time I ever went inside the school-ship in my life; that is, loaded.

Cross-int. 52. At what rate do you judge that the "McCloskey" was moving over the bottom, from the time the tug left her, to the time she was struck?

Ans. Over the bottom, or through the water, is the same meaning, is it? I should judge she was going through the water three or four knots, or over the bottom, as you call it; the tide and the wind were both carrying her.

Cross-int. 53. How much do you judge she moved by the effect of the tide and how much by the wind?

Ans. Well, I should think the tide moved at two, and she made two more by sail. I don't know the force of the current in Boston harbor; I should think not over two knots.

Direct examination resumed by R. H. Dana, jr., esq., of counsel for libellants:

Int. 45. Would the bearings of the schooner and the school-ship seem the same to a person on board the school-ship as they did to you?

Ans. I should think not exactly.

Int. 46. If a straight line were drawn from you to the school-
50 ship, say to her mainmast, at what angle would it meet the line of the school-ship, as near as you can judge?

Ans. (The witness having showed the angle upon paper, to the best of his judgment, it was agreed by counsel that his answer means an angle of about forty-five degrees, formed by the line drawn from the witness to the mainmast and the line from the mainmast forward in the line of the ship.)

Int. 47. Has anything ever passed between you and Mr.] Dana on the subject of any vessels at anchor except his questions put here?

Ans. Well, I couldn't say rightly, except what I've said here to-day. I have said nothing to him, except what I've said here to-day.

Int. 48. Has anything about those vessels at anchor ever passed between you and Mr. Dana to-day, except in presence of the magistrate?

Ans. No, sir.

Int. 49. Has anything passed between you and Mr. Dabney, respecting those vessels at anchor?

Ans. I don't know him.

Int. 50. Did you come here voluntarily, or how otherwise? State all about it.

Ans. I didn't come because I wanted to, by any means. A gentleman, I don't know who he was, came after me with a summons; he wanted to pay me for it, but I wouldn't take any pay.

Int. 51. Had you or not refused to come, totally, until summoned?

Ans. Yes.

HORACE NICKERSON.

Deposition of Richard C. Nichols, taken July 16, 1869, *before me, Cha's F. Walcott, notary public.*

Direct examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. Please state your name, age, and residence.

Ans. Richard C. Nichols; forty-two years of age; residence, Boston.

Int. 2. What is your occupation; and how long and where have you followed it?

51 Ans. Merchant; Boston; in Boston since 1848.

Int. 3. Has your attention been called particularly to vessels; if so, how, how long, and in what way?

Ans. Yes; from having made two voyages to Calcutta and back, and from having been interested in vessels since 1850 with my father and others.

Int. 4. Did you see the collision between the "Java" and schooner "James McCloskey," in November, 1866?

Ans. I did.

Int. 5. Where were you, and who was with you?

Ans. I was on board what is now the ship "Nevada," lying at Grand

Junction wharves; Captain Nichols, master of the ship, and some carpenters at work on her at the time, were with me.

Int. 6. Please state all that occurred within your sight, in the order of time, as to the two vessels, when you first saw them, and where they were, and so forth.

Ans. The "Java" I saw from where she first hove in sight, somewhere about the narrows; I watched her, from time to time, until she was about over a line drawn from where I was to the stern of the school-ship, and when about there she seemed suddenly to change her course; and the schooner, the first time I noticed her, was when she was just off the starboard bow of the school-ship, in tow of a tug, and about casting off from her, her foresail partly up, and mainsail, I think, in the act of being hoisted. The steamer, changing her course, appeared as though she was coming directly astern of the school-ship, and struck the schooner a little forward of the main chains on the starboard side, not directly bows on, but rather glancing, raked her from her main chains aft, carried away her main shrouds on that side. I could hear the breaking of wood; the schooner came to an anchor, and the steamer took the tug that had had the schooner, with a line from the steamer's port bow, and then the tug pulled her in the direction of the northwest, if the wind was from that quarter. I don't know which direction the wind was.

Int. 7. At what time of the day was this, and how do you know it?

Ans. It was between twelve and one; I think, perhaps, twenty minutes of one. I date the time from the fact of the workmen being on the poop of the ship, eating their dinners, and turning to shortly after.

Int. 8. How much time had they, and when, for dinner?

52 Ans. The custom is an hour, between twelve and one.

Int. 9. You say the "Java" appeared to change her course; please to state on what course she was going as to the school-ship before she changed.

Ans. I should judge she was directly on a line with the school-ship; that is, on a parallel line, as near as I could judge from where I stood. I judged she was in mid-channel, though I am not familiar with the channel.

Int. 10. I mean to ask, not on what line she bore from you, but whether, before she changed, she was on a line to go inside or outside of the school-ship.

Ans. On a line to go outside, from where I stood; that is, leaving the school-ship on her starboard bow.

Int. 11. When she changed her course, at what angle did she approach the school-ship?

Ans. [The witness took two blocks, made in the shape of vessels, and placed them in position to represent the angle of the steamer and school-ship after the steamer changed her course, saying that he intended to place them to represent an angle of about forty-five degrees. He said, "That was about the angle, as I stood here," designating his position as one towards which the steamer was heading. Mr. Russell then asked orally whether the point where he stood made any difference in the angle between the two vessels. The witness said, pointing to a place to the eastward of the school-ship, "Standing there, I might calculate the angle differently."]

Int. 12. What do you mean by saying that at the place you stood the angle appeared to be about forty-five degrees, and that, if you had stood off the beam or quarter of the steamer, you might calculate the angle differently?

Ans. I don't know how I shall answer that, exactly; I mean that as I saw the steamer, after she changed her course, she appeared to be heading directly for me, as I stood there. I don't know as I can give any further answer to that question.

Int. 13. Which would be best able to judge of the angle of the two vessels, a man standing where you did, or off her beam or quarter?

(Objected to as incompetent.)

Ans. I think a person standing as I was.

53 Int. 14. Please to state how the schooner bore from the school-ship when the tug let her go.

Ans. Well, the steamer was heading towards the stern of the school-ship, and the schooner was on the starboard side of the school-ship, just off the starboard bow.

Int. 15. State all you saw the "Java" do, in the way of slowing, stopping, or backing, after she changed her course, and before the collision.

Ans. The "Java" opened out beyond the stern of the school-ship before she reversed her screw. I didn't see any sign of the screw having been reversed until a second or two before she struck the schooner.

Int. 16. What signs of the screw being reversed did you then see?

Ans. Well, it disturbed water on each quarter, well forward—to the mizzen chains. I saw, of course, only the port quarter.

Int. 17. When the "Java" seemed to reverse her screw, could she have turned round and gone to the port side of the school-ship?

Ans. Not without danger, I think, to the school-ship.

Int. 18. When she reversed, could she have gone safely either between the schooner and the school-ship or between the schooner and the flats?

Ans. I don't know the position of the flats, but I think she might have gone safely between the schooner and the school-ship.

Int. 19. Did she stop when she reversed her engine, or still go forward?

Ans. She was going forward, from her previous headway.

Int. 20. With an ebb-tide at that place, and under all the circumstances, was there, in your opinion, any objection to her dropping anchor when she backed?

(Objected to, competency of witness as an expert not being shown.)

Ans. I am not competent to say.

Int. 21. Did you see any change in the course of the schooner before the collision?

Ans. I saw the captain shift his helm, and a slight change in the course. He shifted his helm to starboard; she fell off slightly.

54 Cross-interrogatories by W'm G. Russell, esq., of counsel for libellants:

Cross-int. 1. Did you see any change in the course of the "Java" after the two vessels discovered each other?

Ans. None that I could notice.

Cross-int. 2. At which of the Grand Junction piers was the "Nevada" lying; was it pier No. 3?

Ans. I don't know the number; it was some three or four wharves below the shears.

Cross-int. 3. Was it, or not, one of the long piers?

Ans. I never noticed any difference in the length of that pier from any of the others; I never was on it, before or since.

Cross-int. 4. Have you not noticed any difference in the length of the Grand Junction piers; are you not very familiar with them?

Ans. I am very familiar with those that commence with what they

call the round-top building; from there two or three piers down, but not beyond.

Cross-int. 5. Is not the round-top building on the only covered pier of the Grand Junction piers?

Ans. I think it is the only permanently covered one.

Cross-int. 6. Was not the "Nevada" within two or three piers from the covered pier?

Ans. I should think she was certainly five or six piers off.

Cross-int. 7. Are you certain of this?

Ans. Well, I am very positive it is certainly four piers off, and I think more.

Cross-int. 8. Where was the "Nevada" at her pier; were there any other vessels in the same dock?

Ans. She lay at the end, the lower up-and-down berth on the left-hand side going down the wharf; her stern not quite so far down as the end of the wharf. I think no other vessels above her; I don't remember any.

Cross-int. 9. What is the tonnage, and what was the draft of the "Nevada?"

Ans. Well, I don't know her exact tonnage; I should judge about 1,100 tons, new measurement; her draft should have been about ten and one-half to eleven feet aft.

55 Cross-int. 10. At the time the tug let go of the schooner, was the steamer heading for the stern of the school-ship?

Ans. I think she was; I am positive she was.

Cross-int. 11. On which side of it was she then heading?

Ans. Apparently to go astern of the school-ship.

Cross-int. 12. So as to pass the school-ship on the port side, or the starboard side?

Ans. Well, so that the steamer would leave the school-ship on her port side.

Cross-int. 13. At that time she headed directly for you, did she not?

Ans. Almost bows an.

Cross-int. 14. Was she not exactly bows on; if not, how did she vary from it?

Ans. At the time she was coming for the stern of the school-ship; she might have varied a point to starboard; just enough to give me a slight glance of her port side.

Hearing adjourned until the 19th of July current, at the same place, at 10 o'clock a. m.

JULY 19TH, 1869.—By agreement of parties, hearing adjourned until some day hereafter to be fixed upon.

AUGUST 13, 1869.—Hearing resumed; present the witness, Mr. Russell for claimants, and L. S. Dabney, esq., for libellants.

Cross-examination resumed by Mr. Russell:

Cross-int. 15. You testified at the former trial of this cause in the district court, did you not?

Ans. Yes, sir.

Cross-int. 16. Do you recollect testifying at that trial, that, at the time you saw the collision, Fort Independence was about in a range with the stern of the school-ship from where you stood?

56 Ans. I don't remember.

Cross-int. 17. How is the fact? Was Fort Independence about in a range with the stern of the school-ship, as you then stood, or how otherwise?

Ans. Well, I should judge that the stern of the school-ship was out of range to the northward and westward of the fort. I don't know the points of the compass there exactly, but I should judge northwest.

Cross-int. 18. Do you mean that Fort Independence was open from the stern of the school-ship, as you then stood?

Ans. Yes, sir.

Cross-int. 19. Did you not state at the former trial that it was just open, and was it not so?

Ans. I might have done so; I don't remember. I have stated, in answer to the question before this, that the fort was out of range of the stern, and I say so now.

Cross-int. 20. Examine the chart produced by Mr. Dana in this cause, and marked Boschke's Plan, and state whether, according to your recollection, the position and heading of the school-ship on that chart are correct, as she lay at the time of the collision.

Ans. Well, I can't definitely tell which wharf I was on; it was a wharf from three to five wharves below those shears; and, without being certain of the wharf, I, of course, couldn't tell by this chart whether the position of the school-ship was right.

Cross-int. 21. Can you not judge from that plan which wharf you were on at the time of the collision?

Ans. Well, I can't within certainly one or two wharves. If I were going to guess, I should say it was that wharf. (And I have put my initials in blue at the end of the wharf where I think I was.)

Cross-int. 22. Assuming that to have been your position, will you now answer the twentieth cross-interrogatory? (The twentieth cross-interrogatory was read to the witness.)

Ans. Well, I should judge the position of the ship was right, but as to the heading, that would depend on the tide; I should judge she headed farther to the westward; the tide wouldn't make a difference of more than two points. I think she headed two points more to the west than shown on the plan.

Cross-int. 23. Did you, or not, state at the former trial that the
57 steamer was about as near in the range of Fort Independence, at the time she changed her course, as she could well be; or to that effect; and was, or was not, that the fact?

Ans. I don't remember the statement; I think the steamer was above the fort; the fort was out of range to the eastward.

Cross-int. 24. Do you remember that a chart was shown to you at the former trial, in order that you might point out upon it the place where you supposed that the steamer was, when she changed her course?

Ans. I don't have any recollection of having a chart shown me in the court-room, but I recollect stating where I thought she was.

Cross-int. 25. Examine the chart now produced, marked "Exhibit A, W. W., Jr.," and state whether or not you recollect that such a chart was shown you at the former trial.

Ans. I have a recollection of seeing such a chart as this, but don't remember whether it was at the trial; it must have been at the trial, because I've never given my testimony at any other place.

Cross-int. 26. Do you not now recollect pointing out upon such chart the letter H, in the word CHANNEL, as the point where, in your opinion, the steamer made her change of course?

Ans. No, sir; I do not.

Cross-int. 27. Will you swear that you did not so point out that letter as denoting the place of her change of course?

Ans. I will swear that I definitely denoted where I thought she changed her course; but, by looking at the chart, it does not strike that letter.

Cross-int. 28. Please answer the last preceding interrogatory directly? (Cross-interrogatory twenty-seven was read to the witness.)

Ans. Certainly; I will swear I didn't.

Cross-int. 29. Do you not recollect stating at the former trial that the place where the steamer changed her course was just about opposite Slate Ledge Buoy?

Ans. Yes, sir; off Slate Ledge Buoy.

Cross-int. 30. Have you any recollection of stating at the former trial, that just before the collision the steamer changed her course, apparently by putting her helm to starboard, and that this change put her head to port two points or more, or to that effect?

58 Ans. Just before the collision. Yes, sir, I have.

Cross-int. 31. Was that the fact? Did the steamer's head go two points or more to port, just before the collision?

Ans. Immediately, just before the steamer struck the schooner, her head did go two points to port, otherwise she would have cut her through.

Cross-int. 32. Do you recollect stating at the former trial, that before her change of course you supposed the steamer was going just outside the school-ship, as near her as she could go, or to that effect?

Ans. Before her change of course off Slate Ledge Buoy, I supposed she was going outside the school-ship; I don't remember stating as inquired of, at the former trial.

Cross-int. 33. Did you not in fact suppose she was going just outside the school-ship, and close to her?

Ans. I didn't have any supposition about it, but if I had any, I supposed she was coming up, as I've always seen them, outside the school-ship. (To question repeated.) I supposed she would go as near her on the outside as the channel would allow.

Direct examination resumed by L. S. Dabney, esq., of counsel for libellant:

Int. 22. If you ever pointed out the letter H in the word CHANNEL on the chart, as the place where you thought the steamer changed her course, must it not have been in answer to some question which assumed that to be the fact, without particular attention on your part to the place indicated?

(Objected to, as leading, and otherwise.)

Ans. That is my idea of it, exactly.

Cross-examination by W. G. Russell, esq., of counsel for respondents:

Cross-int. 34. Will you swear that you did not point out that letter as the place of change of course, in answer to an interrogatory put by Mr. Dana, by which you were simply asked to point out upon that chart the place of such change?

Ans. Well, I can't swear to anything that happened two years ago; but I am very positive I did not.

RICHARD C. NICHOLS.

59 *Deposition of W'm Parkman Nichols, taken July* 16, 1869, *before me, Cha's F. Walcott, notary public.*

Direct examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. Please give your name at length, and residence.

Ans. William Parkman Nichols, Boston Highlands.

Cross-int. 2. What is your occupation, and how long have you followed it?

Ans. Mariner; for nineteen years.

Int. 3. How many years have you been master?

Ans. Six and a half.

Int. 4. In what ships, and on what voyages, as master?

Ans. First voyage in the ship "Josiah Bradley," from Boston to Buenos Ayres; generally, from Boston to the East Indies; last two voyages to California. The other ships in which I sailed as master are "Templar" and "Nevada."

Int. 5. What opportunities have you had to know Boston harbor?

Ans. Nothing more than sailing up and down the harbor, and what I've studied on my charts when I've been bound in here. By sailing up and down, I mean, when bound in and out, as mate as well as master.

Int. 6. Did you see the collision between the Cunard steamer "Java" and the schooner "James McCloskey," in November, 1866?

Ans. Yes, sir.

Int. 7. Where were you at the time?

Ans. I was standing on the poop-deck of the ship "Nevada," lying at East Boston?

Int. 8. Where was she lying?

Ans. Lying at one of the Grand Junction piers. I think it was pier three; I won't be certain. I think we lay three piers below the pier that is roofed over.

Int. 9. Was the "Nevada" light or deep? How much so?

Ans. Light; drawing about ten feet of water.

Int. 10. Who was with you at the time?

Ans. My cousin, Richard C. Nichols, and several of the workmen, carpenters on board the ship.

60 Int. 11. What was the first you saw of the steamer or schooner?

Ans. I saw the steamer and the schooner at the same time; the schooner was in tow of a tug, bound out.

Int. 12. Where was the steamer, and what was her course when you first saw the schooner?

Ans. The steamer was in the main ship-channel, I should suppose, when I first saw her; I couldn't exactly say how she was steering, but she was going up the main ship-channel, outside the school-ship, I supposed by her course when I first saw her.

Int. 13. Did you see the tug let go the schooner?

Ans. Yes, sir.

Int. 14. Where was the schooner, as to the school-ship, when the tug let go of her?

Ans. She was about four points on the ship's starboard bow.

Int. 15. Did you, at any time before it occurred, apprehend a collision between the steamer and the schooner?

(Objected to, as leading, and otherwise.)

Ans. Yes, sir.

Int. 16. Please to state what you saw that first led you to apprehend a collision.

(Objected to.)

Ans. I was first led to think there would be a collision by a remark made by my cousin, (objected to as irresponsive;) then I saw the steamer change her course, to go inside the school-ship, and I saw then at once that there would be a collision, unless the steamer stopped.

Int. 17. Where was the steamer when she changed her course to go inside the school-ship?

Ans. She was on the port quarter of the ship, and astern of her; about abreast of the "Slate Ledge," I suppose it is called.

Int. 18. At what angle with the school-ship was the "Java" coming, after she changed her course?

Ans. Say an angle between thirty and forty degrees.

Int. 19. Could the "Java," as she came towards the school-ship, have seen whether the passage inside the school-ship was clear of vessels or other craft, unless what she might see over and across the school-ship?

(Objected to.)

61 Ans. No, sir.

Int. 20. Why would there be a collision between the "Java" and the schooner, if the steamer did not stop?

Ans. The schooner could not get out of the steamer's way; and there was not room enough for the steamer to get out of the schooner's way without running on the flat, or striking the school-ship.

Int. 21. Please to state whether this is an opinion formed since the event, or at the time?

(Objected to.)

Ans. Formed at the time.

Int. 22. Did you at the time do any act or use any expression with reference to a collision; and if so, how?

(Objected to, the acts or sayings of the witness not being competent testimony.)

Ans. I made the expression that there would be a collision, unless the steamer changed her course; that was before she got inside the school-ship; before she started to come round; that is, before she got inside altogether of the school-ship; it was after she changed her course to come inside, but before she got inside.

Int. 23. To which direction did you mean she must change then, to avoid a collision?

(Objected to, because the meaning of the witness is not competent testimony.)

Ans. I meant by going the other side—outside of the school-ship.

Int. 24. State what the "Java" did, as to slowing, stopping, or backing, before she struck the schooner.

Ans. I saw no movement made to slow or back, until she was within a very short distance of the schooner; I couldn't say how far, but within a very short distance; she stopped her engine then. After she struck, I noticed that she backed her engine, but not before.

Int. 25. Were you, or not, watching the "Java" then; if so, with what degree of care?

Ans. Yes, sir, we were watching the "Java," all the way up the harbor, from the time we first saw her. After the collision—after the "Java" got clear of the schooner—I saw her steam to her wharf, and a tow-boat take the schooner into East Boston below us.

Int. 26. Could you tell whether her screw was backing, or stopped, or going forward, from where you were?

62 Ans. Yes, sir.

Int. 27. Was there anything to prevent the "Java" from com-

ing to a stop by backing and dropping her anchor, after it was too late for her to turn and go outside the school-ship?

(Objected to, as leading.)

Ans. Nothing that I could see; there was no reason that I could see that she didn't.

Int. 28. If, when the "Java" saw the schooner, it was too late to turn and go outside the school-ship, what resource or resources were there for her to avoid a collision or mitigate it? State all that occur to you as a seaman.

(Objected to, the answer having been already indicated to the witness by the preceding question.)

Ans. It might have been mitigated, I think, by reversing her engines; that is the only thing that I know of. I ain't enough acquainted with steamers to form any other opinion that that.

Int. 29. Do you know of any objection to her coming to anchor at that state of tide? If so, state it. How would stopping, and backing, and dropping an anchor have operated on the "Java" then?

(Objected to, as leading, in connection with preceding question.)

Ans. I can see no objection to her anchoring at the time; the tide being ebb, it would only have brought her up without swinging at all.

Int. 30. Was there anything which the schooner could have done in the position she was placed, which she did not do? If so, state it.

Ans. No, sir; she could do nothing more than she did.

Int. 31. Did you see anything done to the schooner's helm; if so, what?

Ans. I saw her head pay off to port. I supposed it was either the action of the head-sail or the helm that must have done it. I couldn't see the helm from where I was, which way it was put.

Int. 32. How soon before the collision was it that you saw the schooner's head pay off to port?

Ans. As soon as the schooner saw the steamer coming round the stern of the school-ship.

Int. 33. As the school-ship then lay, at ebb-tide, and as near as she was to the flats, do you or not think it safe for a screw steamer
63 as large as the "Java" to undertake to go inside her, at the angle she was going?

(Objected to, as not competent.)

Ans. It was not safe, I should think.

Cross-examination by W'm. G. Russell, esq., of counsel for respondents:

Cross-int. 1. At the time the tug cast off from the schooner, how far was the schooner from the nearest point of the school-ship?

Ans. I couldn't say how far; she wasn't very far off, though; she might have been two hundred feet off.

Cross-int. 2. What part of the school-ship was nearest to her?

Ans. The starboard bow; the end of her jib-boom may have been nearer.

Cross-int. 3. As the schooner went down alongside the school-ship, and before she saw the "Java," did she come nearer to the side of the school-ship, or farther from it, or was her course parallel with the school-ship's side?

Ans. I should say her course was parallel to the school-ship's side; if she was steering any other way, it was off towards East Boston. I suppose she was steering for the channel between Bird Island and East Boston flats.

Cross-int. 4. At the time when you judge that the schooner first saw the "Java" how far was the schooner from the nearest point of the school-ship, and what was that nearest point?

Ans. The nearest point was just abaft the fore rigging of the school-ship. I couldn't say exactly how far she was from it, because I was some distance from the vessels; she was nearer to the ship then than when the tug-boat let go of her, because she was abreast.

Cross-int. 5. Give the distance at that time as nearly as you can?

Ans. I couldn't say, I'm sure, I was so far off; it might have been one hundred feet, and might have been two hundred; I don't know how wide the channel is.

Cross-int. 6. How many points should you say that the schooner payed off to port, after she saw the steamer, and before she was struck?

Ans. About two points.

Cross-int. 7. How many points was she heading away from the school-ship before she began to pay off?

64 Ans. She was heading about parallel with the school-ship, as I said.

Cross-int. 8. Did you not also say she was heading a little way from the line parallel with the school-ship, in towards East Boston?

Ans. I said if she was heading any other way than parallel she was heading in towards East Boston.

Cross-int. 9. At the moment of the collision, how far was the schooner from the nearest point of the school-ship, and what was the nearest point at that time?

Ans. The nearest point was about abreast the main rigging of the school-ship; it was a little farther off than when she was abreast the fore rigging.

Cross-int. 10. Was the schooner at any time between you and the "Java?"

Ans. At the time of the collision she was between us and the "Java."

Cross-int. 11. Did the school-ship at any time intercept your view of the "Java," or of any part of her?

Ans. No, sir.

Cross int. 12 Did you at any time see her over or across the school-ship?

Ans. No, sir.

Cross-int. 13. Suppose the "Java" had slowed her engines, at any time on her course up the harbor, could you have observed it except by its effect upon her speed?

Ans. Only by her speed; and the action of the water, too, I suppose.

Cross-int. 14. Do you mean to swear that you could have observed it by the action of the water, if she had only slowed her engines?

Ans. I mean to say, if the steamer was light you could observe by the action on the water whether she slowed or not.

Cross-int. 15. Was she light or not?

Ans. I couldn't swear whether she was light or not.

Cross-int. 16. At what distance could you have observed by the action of the water, whether she had slowed her engines?

Ans. Well, I could see from where we were to the school-ship certainly; a mile, certainly.

Cross-int. 17. How far were you from the school-ship?

65 Ans. I wouldn't swear how far I was.

Cross-int. 18. State, as nearly as you can judge, the distance.

Ans. Well, a quarter of a mile.

Cross-int. 19. Are you ready to swear positively that the engines of

the "Java" had not been reversed, and that they had not made several revolutions backward, before she struck the schooner?

Ans. I couldn't swear to that; but I saw when she struck the schooner that her engine was stopped then and not before.

Cross-int. 20. Do you mean to swear positively that it had not begun to work backward at that time?

Ans. As far as I can judge, it had not. (To question repeated.) I could not swear that it had not.

Cross-int. 21. How far apart do you judge the steamer and schooner to have been when either first saw the other?

Ans. Two steamers' lengths off, or more.

Cross-int. 22. Do you mean to say you think they were that distance apart when the schooner first saw the steamer?

Ans. I should judge they were.

Cross-int. 23. Did you notice any change in the heading of the steamer, from the time the schooner and steamer came in sight of each other to the time they struck?

Ans. No, sir.

Cross-int. 24. Would you have noticed it if there had been any such change?

Ans. Yes, sir.

Cross-int. 25. On which side of the school-ship did the "Java" pass in going up to her wharf after the collision?

Ans. Starboard side.

Cross-int. 26. Suppose a straight line drawn through the school-ship from stem to stern and continued down the channel, on which side of that line, the south or north side, was the "Java" when you first saw her?

Ans. On the south side.

Cross-int. 27. How far above "Fort Independence" was she then?

Ans. Somewhere between, half-way between the fort and ship, I should think; from one-half to three-fourths.

Cross-int. 28. Was she about in mid-channel?

66 Ans. I should judge she was.

Cross-int. 29. Did she so continue until she changed her course opposite Slate Ledge Buoy?

Ans. Yes, sir.

Cross-int. 30. Have you ever commanded a screw steamer, or other steamer?

Ans. No, sir.

Cross-int. 31. In what command are you at present?

Ans. No command.

Cross-int. 32. For whom did you last sail as master, in what ship, and when did you leave her?

Ans. W'm F. Weld and Company; ship "Nevada;" I left her February 19th, this year.

W. P. NICHOLS.

Deposition of Judah Baker, taken August 4, 1869, before me, Charles F. Walcott, notary public.

Direct examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. Please state your name, age, place of business, and residence.

Ans. Judah Baker, sixty-five years of age, September 11, next; place of business, 99 Commercial street, as a general thing; residence, South Boston, 385 Broadway.

Int. 2. Have you been at sea; if so, how long as master?

Ans. I have been a coastwise master mariner for twenty years, to speak within bounds.

Int. 3. How much of this time have you sailed out of Boston?

Ans. Well, perhaps it would be safe to say ten years; about six from New York to Philadelphia, I should judge; hither and thither, everywhere from Eastport to North Carolina, the rest of the time.

Int. 4. When did you cease to go to sea?

Ans. I ceased say twenty-five years ago.

Int. 5. Since you left going to sea, what has been your business, and where have you followed it?

67 Ans. I acted as packet agent for Hardy & Baker for about five years; since that time ship chandlery and groceries has been my constant employ; in the city of Boston.

Int. 6. While doing business in Boston, to what extent have you observed the harbor of Boston, and vessels passing up and down?

Ans. I might say daily, but to give times and places would be very difficult. I cross South Boston draw twice a day, going from my place of business to my residence. Always, when it is in sight, I have observed the harbor; I might say daily.

Int. 7. Did you see the "Java" on the day when she collided with the schooner "James McCloskey?"

Ans. I saw a steamer on that day, that I afterwards learned was called the "Java."

Int. 8. Please give an account of where you were, and what you saw, respecting the "Java."

Ans. I had been over to East Boston, as it is my custom, to visit the dry-docks down to the end of the point. I had no particular business there except to look and see what vessels were hauled up and what business was going on; on my return, I noticed this steamer, of which I have spoken, coming up the channel, somewhere not far from mid-day, it might be later than twelve, but not far from mid-day; my attention was attracted to her more particularly, as she neared Long Wharf she turned suddenly off to the right; she wound off, I should judge, nearly four points. [I took the more notice of her because I couldn't comprehend what her motive was in doing so; finally came to the conclusion that she might be crossing the channel to anchor on the leeward side out of the way of vessels; I couldn't imagine what else it was for.] I looked at that vessel, as she neared the school-ship, and saw her bows passing the stern of the school-ship, very near to her.

(Part in brackets objected to by Mr. Russell as irresponsive, and as giving the judgment of the witness, and not facts.)

Int. 9. How far had you got from the dry-dock when your attention was first called to the "Java;" where were you?

Ans. I should think I had got nearly one-third of the distance from the dry-dock to East Boston ferry-way; my view was clear, no obstructions to prevent my looking at the ships; nothing in the way; no vessels.

68 Int. 10. At what distance do you think the "Java" was from the stern of the school-ship, when she got abreast of her stern?

Ans. Not much more than the length of the "Java" herself. I doubt whether there was that distance between the two, to appearance.

Int. 11. State, as nearly as you can recollect, at what angle with the line of the school-ship the "Java" seemed to be coming after she changed her course?

Ans. I should say forty-five degrees, or nearly that, to the best of my judgment.

Int. 12. Do you remember whether you noticed the schooner which the steamer afterward struck?

Ans. I did not see the collision, nor have I an impression sufficiently strong concerning the schooner to say one word about her. I didn't see the schooner enough to be a witness about her; I have no recollection of seeing her.

Int. 13. Have you noticed the Cunard steamers in their coming up the harbor, the last twenty years?

(Objected to.)

Ans. I suppose I must have seen them a good many times.

Int. 14. What is their usual course up, as you have observed it?

(Objected to.)

Ans. You ask the usual course; I am not master enough of the channel to give the exact course; their usual course is to keep the main channel, about half the distance, I should say, from the school-ship to Long Wharf; that would be the best water.

Int. 15. Have you ever known a Cunard steamer, except in this case, go, or attempt to go, inside the school-ship?

(Objected to.)

Ans. I never saw one.

Ans. 16. Are you familiar with the position of the school-ship at her moorings?

Ans. I have visited that ship several times, and have noticed the depth of water at her stern; [if not mistaken, she lays very near the bottom at low water, I won't say that she grounds, except at very low course of tides, but she lays very near the ground, that is, at ebb-tide, tailing on the flats.]

(Part in brackets objected to by Mr. Russell as irresponsive.)

69 Int. 17. Do you mean that at very low course of tides her whole keel is on bottom, or her stern, or how otherwise?

(Objected to.)

Ans. Her rudder, I should think, would touch at a very low course of tides, as she lies pointing off the channel.

Int. 18. From your experience, please give your best judgment as to a vessel like the "Java" going inside the school-ship, at from one to one and a half hours' ebb-tide, coming up the harbor, as to its prudence and safety?

(Objected to, because witness is not shown to be competent.)

Ans. It might be practicable, but, in my judgment, it would be imprudent to do so.

Int. 19. Why do you say it would be imprudent?

(Objected to, as above.)

Ans. For several reasons: one is, the school-ship, with wind to westward, must tail on to the flats, and the tide sweeps across these flats; and another is, there is hardly distance enough when the school-ship so tails, between the stern of the school-ship and the flats to give a proper channel or berth for a large vessel to pass. I could describe, if necessary, what is to be done in such a case, but I am not asked.

Int. 20. Please do so.

(Objected to, as above.)

Ans. In order to avoid trouble, I should have swung the vessel off, away down in the channel, kept as close on the east side of the channel as possible, so as to bring the steamer on a line with the school-ship

W. W., jr.," and state whether you are sufficiently familiar with the wharves at East Boston to designate upon that chart the wharf on which that building stands, and the location of the dry-docks; if so, please designate them.

Ans. Well, the dry-docks are down at the point; there is nothing on that chart to show a dry-dock, that I can see, anywhere; there are two dry-docks somewhere in this vicinity; (the witness placing his finger at the point on the exhibit marked "C. F. W.," the magistrate's initials;)

73 [the witness adding:] if you went there you couldn't tell where the dry-docks were, with that chart in your hand. I can't tell on which wharf the building is; I think it might be the third one from the Cunard wharf.

Cross-int. 18. Will you designate on that plan, as nearly as you are able, the spot on which you stood when the building began to intercept your view of the "Java?"

Ans. See the delicacy of the question and the simplicity! There is a question you can answer just as well as I can, and better; there you have it; if you can draw a straight line, you can tell. (The spot designated by the witness is the dot where the magistrate's initials "C. F. W." are marked.) It was there, as near as I can say.

Cross-int. 19. Read the twentieth and twenty-first direct interrogatories and your answer to the same, and state whether a steamer could come up the channel in a line with the school-ship, as inquired of in the twenty-first interrogatory; and, if so, from how far below the school-ship could she come up in that line? (The twentieth and twenty-first interrogatories and answers were read to the witness.)

Ans. Not three times her length, on an ebb-tide; because I've told you all along the ebb-tide swings the ship on the flats, and to be on a line with the ship meant directly astern of her.

Cross-int. 20. Is that what you understood Mr. Dana to mean by his question, interrogatory twenty-first?

Ans. I don't know as I can describe it any better than I have.

Cross-int. 21. Examine the plan now shown you and marked "Mr. Boschke's plan," and state whether, in your opinion, it correctly represents the position and heading of the school-ship, as she lay at the time you saw the "Java."

Ans. Well, to the best of my knowledge and belief, I should say it did.

Cross-int. 22. Do you not think she tailed about three or four points more to the northward and eastward than she is represented in that plan?

Ans. She might have done so on that day, the wind being far to the west.

Cross-int. 23. What is your opinion about it?

Ans. Well, if she varied from that position, the stern of the vessel inclined more northerly; much depends on the strength of tide.

74 Cross-int. 24. Do you, speaking from recollection, mean to express an opinion that she did tail three or four points farther to the northward and eastward than is represented?

Ans. Three or four points would be too much, I think; the wind wasn't strong that day; the wind was light, and the weather was fine.

Cross-int. 25. Speaking from recollection, how many points should you say she varied from the direction shown on that plan at the time you saw the "Java?"

Ans. Well, I shouldn't want to allow more than two points; I should think that would be enough, under the circumstances.

Cross-int. 26. Allowing two points, would there be any difficulty in a steamer coming up the channel on a line with the school-ship from a considerable distance down the harbor?

Ans. Shoal water, of course, would prevent it; two points each way would be four; I mean the extreme each way from the position on the plan. I have answered that in my best judgment the school-ship tailed two points more to the northward when I saw the "Java" than is shown on that plan; and, tailing in that way, the "Java" could not have come up on a line with her for more than three lengths of the "Java."

Cross-int. 27. Supposing the school-ship to tail as represented on that plan, from how far below could a steamer, drawing nineteen feet, come up in a line with her, without any obstruction from shoal water, at one hour's ebb-tide?

Ans. I have repeatedly said not three lengths. You see by the depth of water that she couldn't, because it's marked seventeen.

Cross-int. 28. Did you recognize the "Java" when you saw her on the day of the collision?

Ans. I did not know the vessel's name.

Cross-int. 29. Had you never seen her before?

Ans. I might have seen her before; she had never been here, I was told, but once or twice.

Cross-int. 30. Had you ever seen her before?

Ans. I could not swear that I had.

Cross-int. 31. You testified at the trial of this cause in the district court, did you not?

Ans. I believe I did, sir,

75 Cross-int. 32. (De bene esse, subject to the admission of the 13th, 14th, and 15th direct ints.) Did you not then testify that you saw the Cunard steamer come up the harbor, which came in last before that trial, and that you could not say whether she passed inside or outside the school-ship?

Ans. I don't recollect one word about it, if I stated it.

Cross-int. 33. (De bene, as above.) Do you recollect stating that you never saw the New York, Philadelpia, Baltimore, or Eastern steamers go inside the school-ship?

Ans. I never saw those British steamers, large steamers, pass inside the school-ship, but to include all that you name would be a different thing. (To question repeated.) I don't remember ever seeing them, but it may have occurred. I don't recollect ever seeing any steamer go inside the school-ship. I don't mean to include the city Deer Island steamer; she goes down every day through the Bird Island Channel; she goes along shore.

Cross-int. 34. Have you ever commanded any steamer, or served in any capacity on board one?

Ans. Never.

Cross-int. 35. Have you acted as agent of the owners of the schooner "McCloskey," or her cargo, in procuring the attendance of witnesses in this cause, or otherwise?

Ans. I don't recollect having been the cause of any witness having been summoned through my agency or influence.

Cross-int. 36. Have you not conferred with counsel, parties, or witnesses, about the case, and given advice to the captain and owners as to the course to be pursued for recovering damages of the "Java?"

Ans. The captain of the vessel called at my store and asked me, in his absence, to assist or advise in anything that might arise in the case. He is a neighbor of mine; I have no interest of any kind in the case.

Direct examination resumed by R. H. Dana, jr., esq., of counsel for libellants:

Int. 26. How long after you ceased to see the "Java" did you learn of the collision?

Ans. Next day, in the morning.

76 Int. 27. At the time you last saw the "Java," independently of any danger generally from her course, was there any vessel in particular you thought she was in danger of colliding with?

Ans. I saw none. I saw the jib-boom of the "Java" come out from the school-ship, and that is the last I did see.

JUDAH BAKER.

Deposition of Elnathan Crowell, taken Sept. 7, 1868, before me, Charles F. Walcott, notary public.

Direct examination by L. S. Dabney, esq., of counsel for libellants:

Int. 1. State your name, age, residence, and business?

Ans. Elnathan Crowell; forty-seven years of age; West Dennis, Massachusetts; I am a seaman, captain.

Int. 2. How long have you been captain? Were you in command of any vessel in November, 1866; if yes, what was her name?

Ans. I have been captain from twenty to twenty-five years. I was in command of the "James McCloskey," in November, 1866.

Int. 3. Where was your vessel on the 7th of November, 1866?

Ans. In East Boston.

Int. 4. Was she bound on any voyage; if yes, to what port, and what was her cargo?

Ans. She was bound to New York; her cargo was 1,321 bags of linseed.

Int. 5. Who owned the linseed?

Ans. The Judd Linseed and Sperm Oil Company.

Int. 6. Did you get started on your voyage to New York?

Ans. I did.

Int. 7. Describe where the schooner lay at East Boston; how you got started, and what happened afterwards.

Ans. She laid one pier from the shears, one wharf above the shears; it may be two lengths of our vessel above the shears. We got up part of her mainsail and part of her jib, to see if we could get away from the wharf; the wind so much on that she wouldn't fetch off, and we fetched up alongside the shears and took in all sail; the steam

77 tug "Clover" came along then, and I got him to take me off where I could make sail; as soon as she left the wharf, I ordered the foresail to be hoisted, as soon as she got away, got started; when the tug-boat let go the line and sung out to us to haul in the line, we had about two-thirds of the foresail up, as near as I could judge.

Int. 8. How was the wind, and what the condition of the tide, and who was at the helm?

Ans. The wind, I should think, was not far from west; there was a clever, decent breeze; I should say it was a little to the southerly of west; the tide just made ebb; the tide was running not over one knot; I was at the helm myself.

Int. 9. What happened after the tug let go of you?

Ans. I got run down by the "Java;" after we drawed out past the school-ship, we saw this steamer coming for us; I gave the alarm that she was coming into us; the first thing that I heard from the steamer was that they were going all clear of us; they sang out; the next thing

was they were into us; her catheads struck the main rigging first, and cut that off, and her bow then struck just abaft the main rigging; the steamer backed off from us then; and the next thing then, we found the vessel was sinking. I ordered the colors to be set in the rigging for the tug-boat which had gone to the steamer, I suppose to assist her in; she saw my colors set, and came to us. She took hold of us, and towed us into East Boston, as far as she could tow us; when she got in, she was about half full of water, as nigh as I could judge; I mean the "James McCloskey" was half full of water.

Int. 10. Did your cargo suffer any injury?

Ans. The cargo was damaged, and sold at auction at the same wharf where we took it in.

Int. 11. Where were you with reference to the school-ship, when the tug left you after setting you out from the wharf?

Ans. As nigh as I could judge, we were about abreast of the bow, and inshore of her about three hundred yards, inside of her towards East Boston.

Int. Where was the school-ship lying?

Ans. She was a lying off there at her moorings.

Int. 13. Can you describe where that was?

78 Ans. I can't describe it; it's off East Boston.

Int. 14. Can you show on this map where the school-ship lies, and where your schooner was when the tug dropped the line?

(The map shown to the witness in connection with the above question has been marked "Exhibit X," and identified by the magistrate.)

Ans. I can't show on that map. I never handled one of them, not since I was a boy; not one of those small maps.

Int. 15. How was the school-ship heading?

Ans. I should think she was heading about northwest.

Int. 16. When did you first see the steamer?

Ans. As soon as we drawed out past the stern of the school-ship.

Int. 17. Had you heard anything of her before then?

Ans. No.

Int. 18. Had you any lookout?

Ans. I had.

Int. 19. Was the weather clear or thick? How far could you see?

Ans. Clear. I should say I could see five or six miles.

Int. 20. Was your schooner sailing or drifting?

Ans. Sailing.

Int. 21. How fast?

Ans. From three to four knots; I should judge, the vessel was going three knots through the water, and there was one knot current; she hadn't lost the way the tug gave her.

Int. 22. Which side of the school-ship did you go, and how were you heading when you saw the steamer first?

Ans. We were on the inside of her, between the school-ship and East Boston; I should think we were heading about southeast.

Int. 23. How was the steamer heading when you first saw her?

Ans. Heading right for us amidships.

Int. 24. How far off?

Ans. Well, about as far as you could make any one hear; say about three hundred yards; some little distance off.

Int. 25. Could you have seen the steamer any sooner, if the school-ship had not been there?

Ans. I could.

Int. 26. What did you do, when you saw the steamer?

Ans. I hollered out that they were coming into us; I didn't do anything else; I couldn't do anything else, unless to jump overboard;
79 the boys thought she would sink us right down, she was so high up for us to get hold of.

Int. 27. Did you do anything with your helm?

Ans. I put it hard astarboard.

Int. 28. Was any effect produced by this on your schooner?

Ans. She altered but very little; it was so quick done; maybe a couple of points.

Int. 29. What sail had you on, when you first saw the steamer?

Ans. Had about two thirds of the foresail.

Int. 30. Was it drawing any?

Ans. Yes.

Int. 31. Where was the steamer heading for, when you first saw her?

Ans. She was heading right for us about amidships; she was heading right square in across the school-ship's stern, and if she had gone the length of her after she struck us, on the same course, she would have been hard aground; she wasn't heading where she was bound.

Int. 32. Was she heading, so that she would have to turn after passing the school-ship to go to her wharf?

Ans. She was.

Int. 33. Whether or not any change was made, or you heard any orders given on board of her to change her course, after you hailed? What, if any, answer did you get to your hail?

Ans. I didn't see any change in her course at all; all that I heard was that she was going all clear; I didn't get any answer, except I heard them say she was going all clear.

Int. 34. How far could you see to, from the dock from which you started?

Ans. I could see down to the fort; I mean to Castle Island. The school-ship lay about south of where we started from, and Castle Island about southeast.

Int. 35. Why did you not get out of the steamer's way, after you saw her?

Ans. Because we couldn't do anything more than what we did; there were vessels to leeward of us at anchor on the shoal ground, on the anchoring ground; we had no room to get out of the way, to do more than what we did.

80 Int. 36. Why didn't you go down the other side of the school-ship?

Ans. I couldn't go down the other side, except I went up against the tide, and went round her.

Int. 37. How much experience have you had in going in and out of Boston Harbor?

Ans. I have been going, ever since I took charge of a vessel, I should think, an average of eight to ten trips a year, for from twenty to twenty-five years.

Int. 38. Have you ever before gone down inside the school-ship?

(Objected to, as immaterial.)

Ans. I have, sir.

Int. 39. Is it usual for any vessels to pass inside the school-ship?

(Objected to, as last.)

Ans. Yes.

Int. 40. What kind of vessels?

(Objected to.)

Ans. All small vessels; I never saw any big vessels go inside, that I know of, of a large class.

(Answer objected to by counsel for respondents.)

Int. 41. Did you ever before see a Cunard steamer try to go inside of the school-ship?

(Objected to.)

Ans. I never did.

Int. 42. How near did the steamer come to the stern of the school-ship?

Ans. Well, I should think she was five hundred yards off.

Int. 43. How far was the steamer from the school-ship, when she was nearest to her?

Ans. Well, I don't know about that; after she got into us, when she backed off from us, she was farther from the school-ship than when she struck us; we both drifted down some. [To question repeated.] When she struck us, I should judge she was about as nigh as she was at any time; I should think that was five hundred yards, or more.

Int. 44. How many times the length of your vessel from the school-ship?

(Objected to.)

Ans. I should think, maybe half a dozen lengths.

81 Int. 45. How long is your vessel?

Ans. She is a hundred and twenty-one, or a hundred and thirty-one, I don't recollect which; I mean the length of the vessel; from the end of the jib-boom to the end of the main boom would be about twice as much; about three hundred feet. I suppose the length of the vessel would be from the end of the jib-boom to the end of the main boom.

Cross-examination by William G. Russell, esq., of counsel for respondents:

Cross-int. 1. Who on your vessel first discovered the steamer?

Ans. I heard a boy sing out forward, and I looked and I saw her.

Cross-int. 2. Who was the boy who sang out forward?

Ans. I couldn't tell whether it was the mate or one of the men before the mast.

Cross-int. 3. What was the mate's name; where was he standing, and what was he doing. when the steamer was first discovered?

Ans. Peleg T. Crowell; he is my son; he was forward; all of them were forward; he was hoisting the foresail; I don't know that the mate was hoisting; the mate don't generally work, but lends a hand once in a while.

Cross-int. 4. What are the names of the men; what were they doing when the steamer was first discovered? State as to each of them.

Ans. Charles Perkins, Charles Ellis, I think, was another, and Eneas G. Baker. They were hoisting the foresail when I heard the alarm given from forward.

Cross-int. 5. You were present and testified at the former trial, were you not, and heard your son Peleg T. Crowell testify, did you not?

Ans. I was, and did.

Cross-int. 6. You remember that he testified that the school-ship, at the time of the collision, headed down the harbor, did he not?

(Objected to.)

Ans. I think I heard him say that she headed down the harbor, with the tide running ebb; he made a mistake.

(Answer objected to by counsel for libellants.)

Cross-int. 7. You remember that he testified that when the steamer was first discovered, he and another man were hoisting on the fore peak, did he not?

82 (Objected to.)

Ans. I shouldn't say I did; he might have said it, but I don't recollect.

Cross-int. 8. Were not your men hoisting the fore peak at that time?

Ans. Yes, they were hoisting foresail; I don't know whether they were hoisting the peak or throat; I calculate they were hoisting both; there were men on both sides, and they generally hoist both at the same time.

At fifteen minutes before five o'clock, p. m., the hearing was adjourned until Tuesday, September 8th inst., at nine o'clock a. m. at the same place.

TUESDAY, *Sept.* 8, A. D. 1868, 9 o'clock a. m.—The hearing was resumed, pursuant to agreement, the respective parties being represented by the same counsel as at the previous hearing.

Cross-int. 9. How many men does it take to hoist your foresail, when the sail is drawing?

Ans. Well, you can hoist it with four men, or hoist it with more; you can do just as you're a mind to as to that. I mean to say two men or more, and not four men.

Cross-int. 10. While the tug was towing your schooner, which of your men were employed in attending to the tow lines?

Ans. There wasn't any of them attending to it till they let go of it.

Cross-int. 11. When she left you, which of your men attended to taking in the tow lines? How many of them?

Ans. I think they all got hold of it, excepting the mate.

Cross-int. 12. Did the tug take your schooner out from the wharf in a direct line for the school-ship?

Ans. Well, we were going out very nigh for her; we had to go out that way to clear the shoal water till we got out in the channel. We couldn't go more than a length or two of the vessel farther to the eastward, on account of the shoal water.

Cross-int. 13. What part of the distance out from the wharf to the school-ship did the tug take you?

83 Ans. I answered that question yesterday, saying that she let go of us about abreast of the bow of the school-ship.

Cross-int. 14. Please state what proportion of the distance from the wharf to the school-ship she took you?

Ans. I should think just about two-thirds of the distance, just about; I don't believe you could alter it if you measured.

Cross-int. 15. How much water did your schooner draw at the time of the collision?

Ans. Eight feet.

Cross-int. 16. After the tug left you, state, as nearly as you can, how your schooner headed by compass? How did she head with reference to the direction in which the school-ship tailed?

Ans. I should think we were heading about southeast. We were going down very nigh parallel to her; we were heading, if anything, a little to the eastward of the line of her tailing.

Cross-int. 17. Then when you discovered the steamer you put your helm hard to starboard, so that the schooner fell off two points, did you not?

Ans. I didn't do that till just as she struck us. I saw her right over my head, and did that, and jumped out of the way, so that I shouldn't get hurt; it wasn't a second, I suppose.

Cross-int. 18. Did you not put your helm hard to starboard just as soon as you could after you saw the steamer?

Ans. No, sir.

Cross-int. 19. Have you not stated that your schooner fell off two points, after you put the helm to starboard, before the vessel struck?

Ans. I have.

Cross-int. 20. Did she fall off two points in one second?

Ans. I should think likely she did.

Cross-int. 21. Was the effect of her falling off to make the blow more square or glancing?

Ans. It was to make it more glancing.

Cross-int. 22. Was that the object of your putting your helm to starboard?

Ans. It was.

Cross-int. 23. Did the steamer alter her course from the time you first saw her till she struck you?

84 Ans. I didn't see any alteration.

Cross-int. 24. Would you have seen it if she had altered her course?

Ans. I think I should.

Cross-int. 25. At what angle did the steamer strike the schooner?

Ans. Well, she gave us a glancing stroke, glancing towards our stern.

(The witness, in further answer, put two pens in position on the table to represent the angle made by the starboard sides of the vessels when the steamer struck, and the angle so designated by him was agreed by the counsel to be about fifty degrees.)

Cross-int. 26. How far had your vessel got past the stern of the school-ship when the steamer struck her?

Ans. Well, I should think likely five hundred feet.

Cross-int. 27. How far was she by the stern of the school-ship when you first saw the steamer?

Ans. We saw her just as quick as we drawed past the stern. I mean when she was first seen forward; of course, as we were going down, she would open forward first.

Cross-int. 28. Then you ran about five hundred feet from the time you first saw her to the time she struck you? Is that so?

Ans. Yes, I guess that is so.

Cross-int. 29. How far had you run from the time the tug left you to the time you saw the steamer?

Ans. The tug left us about abreast of her school-ship's bow, and we saw the steamer when we drawed out past her stern. I don't know what the length of the school-ship is; we had run about the distance from the bow to the stern of the school-ship.

Cross-int. 30. When you testified at the former trial, you stated that the steamer, when you first saw her, was heading about for the wharf you had left; did you not? Have you any reason to change that statement?

Ans. I don't recollect that I said any such thing.

Cross-int. 31. Do you state that you did not say any such thing?

Ans. I didn't say that I didn't state it, but I don't recollect it. If I said it, I meant it.

(Last clause of answer objected to by counsel for libellants as not responsive.)

Cross-int. 32. Did you see the steamer "Java" at any time from

85 the time she passed Castle Island to the time you were drawing by the stern of the school-ship?

Ans. Not until we came out past the school-ship.

Cross-int. 33. Why did you not see her while she was coming up the channel from Castle Island to Slate Ledge Buoy?

Ans. I don't know any other reason, except that she was so far to the southward that the school-ship hid her. If she had been coming up parallel with the school-ship, we could have seen her at any time.

Cross-int. 34. Would the school-ship hide her from you all the way from Castle Island up to Slate Ledge Buoy, if she kept on the south side of the channel?

Ans. I should say not.

Cross-int. 35. Why, then, did you not see her?

Ans. Because she was so far to the southward that she was hid behind the school-ship, I suppose.

Cross-int. 36. Why did you not see her, when she passed Castle Island?

Ans. I couldn't say that.

Cross-int. 37. Why did you not see her for the next half mile of her course, after she passed Castle Island?

Ans. Well, I don't know; I couldn't say.

Cross-int. 38. Why did you not see her the next half mile of her course?

Ans. I have no other reason, except the one I just gave you. She must have been then three miles off.

Cross-int. 39. Do you mean to be understood to say, that when she was three miles off the school-ship hid her from you?

Ans. That's what I mean.

Cross-int. 40. And do you mean to say that the school-ship continued to hide her from you, until the time you discovered her?

Ans. I do.

Cross-int. 41. Did any one on board your vessel see her before your schooner drew past the stern of the school-ship?

(Objected to, because it asks for something which may be hearsay, and if not hearsay, is not within the knowledge of the witness.)

86 Ans. As soon as we drawed out past, we saw her, not before; of course not.

Cross-int. 42. Did any one on board your vessel report the steamer to you before the time when your schooner was just drawing past the stern of the school-ship?

Ans. That was the first, as soon as we drawed out, of course.

Cross-int. 43. When you first saw the steamer, were you not afraid to starboard your helm, for fear of running ashore?

Ans. There was a vessel right under our lee at anchor; we couldn't do it without running vessels down. Several vessels were at anchor directly under our lee. I know the first one was a schooner. I don't know what the others were; the first one was so nigh to us, I couldn't help seeing what she was; the rest were up in a heap, and I didn't notice.

Cross-int. 44. How near to you were those vessels at anchor?

Ans. When the steamer struck us we were very nigh abreast of the first one, just nigh enough to go clear of her, considerably nigher her than we were to the school-ship. When we dropped our anchor we swung round and just went clear of her. When I first discovered the steamer the schooner was about five or six times the length of my vessel from us. I mean length from end of jib-boom to end of main-boom.

Cross-int. 45. Which way did she bear from you, at the time you first saw the steamer?

Ans. I should think she was about northeast from us, under our lee.

Cross-int. 46. Why did you not mention those vessels to leeward at the former trial of this case?

Ans. Because I wasn't asked the question; I don't know as I was ever asked the question.

Cross-int. 47. Have you any reason for changing the statement of the speed of your schooner at the time of the collision from two knots per hour, as stated at the former hearing, to three or four knots per hour, as now stated by you?

(Objected to, as assuming something which has not been stated.)

Ans. If it was put down so, it was not correct. I didn't give in any deposition that she was going only two knots.

Cross-int. 48. How long a time elapsed from the time the tug started you from the wharf to the time of the collision?

87 Ans. It might have been thirty minutes.

Cross-int. 49. How much of that time did she have you in tow?

Ans. Well, I should say half the time, about half the time.

Direct examination resumed by Mr. Dabney, of counsel for libellants:

Int. 46. When you put your tiller hard to starboard and jumped out of the way, what did you do with the tiller?

Ans. I put it in the becket.

Int. 47. What do you mean by one second, when you say your schooner fell off two points in one second?

(Objected to.)

Ans. I just had time to get from the tiller past the mainmast. I should say twenty-five to thirty feet.

Int. 48. Did the steamer blow her whistle as she came up?

(Objected to as not admissable on reëxamination.)

Ans. I never heard her.

Int. 49. Was the steamer running up or across the channel when you first saw her?

(Objected to, as last.)

Ans. She was going across the channel.

Int. 50. When you discovered the steamer, how much channel had you to leeward?

(Objected to, as last.)

Ans. All that we had was just room enough to keep clear of the vessels at anchor.

Int. 51. If you had seen the steamer passing Castle Island, or for the next half mile of her course, or two miles of her course in the channel, would you have expected to meet her inside of the school-ship?

Ans. I should not.

ELNATHAN CROWELL.

88 *Deposition of Peleg T. Crowell, taken Sept.* 16, 1868, *before me, Chas. F. Walcott, notary public.*

Direct examination by R. H. Dana, jr. esq., of counsel for libellants:

Int. 1. Please state your name at length, residence, and occupation.

Ans. Peleg T. Crowell; West Dennis; I follow the sea.

Int. 2. Were you on board the schooner "James McCloskey" at the time of the collision with the "Java?"

Ans. Yes, sir.

Int. 3. In what capacity?

Ans. Mate, sir.

Int. 4. Describe how you left the wharf and got under way.

Ans. Well, we started to get under way first, and couldn't get away from the wharf very well first, so we got a tug-boat to tow us out.

Int. 5. How far did the tug take you as to the school-ship?

Ans. She took us pretty nigh to the school-ship.

Int. 6. Who were on board, besides you and the captain?

Ans. Two men and the cook.

Int. 7. Did you hoist sail? When did you begin to do so?

Ans. Yes, sir, the foresail; we hoisted it up part way; we began to hoist it, while the tug-boat was hold of us.

Int. 8. Describe how you hoisted the foresail, as to throat and peak; who hoisted on each?

Ans. We hoisted the throat up, while the tug-boat was hold of us; the peak was down; we all hoisted up the throat, while the tug-boat was hold of us; when the tug-boat let go, me and another man hoisted on the peak, and the cook and another man were hauling in the line.

Int. 9. Can you hoist the throat fully up, before hoisting on the peak?

Ans. No, sir.

Int. 10. Does it require as many to hoist the peak as the throat?

Ans. Well, sometimes the peak goes a good deal harder, but generally goes the easiest; when the rope is wet, it goes harder, but when it is dry, it goes a good deal easier.

89 Int. 11. Which generally requires the most force?

Ans. I thought I had just answered that question.

Int. 12. Where was the captain at this time?

Ans. He was at the wheel, sir.

Int. 13. Which side of the school-ship did you go down?

Ans. Went inside of her, sir.

Int. 14. Which way was the tide?

Ans. The tide was running ebb.

Int. 15. How was your course as to the school-ship; parallel, or angling, or how otherwise?

Ans. Well, we were nearly abreast of the school-ship.

Int. 16. Were you on a line with her, or angling?

Ans. We were on a line, very nigh.

Int. 17. State what you first saw of the "Java."

Ans. I saw her coming for us.

Int. 18. How far had you got, when you first saw her?

Ans. I didn't notice how far we'd got; I looked up, and saw her.

Int. 19. How far had you got as regards the school-ship?

Ans. About two-thirds the way of the school-ship.

Int. 20. Had you, or not, got abreast the school-ship before you saw the "Java"?

Ans. I didn't notice whether we had or not.

Int. 21. What were you doing when you saw the "Java"?

Ans. Hoisting the peak.

Int. 22. State just what you saw, and how things looked, when you first saw the "Java."

Ans. I saw her coming head to, and a whole lot of men standing forward.

Int. 23. How was she bearing as to your vessel, when you first saw her?

Ans. Well, I can't tell, unless I had a pencil, or something. If I had a pencil I could tell you. She was coming about for our main chains. (Pencil and paper being given to witness, he drew the diagram hereto annexed, marked Exhibit V. Peleg T. Crowell and the magistrate

marked thereon the words "vessel's" and "steamer's course," as designated by the witness.)

90 Int. 24. How near do you think she was, when you first saw her?

Ans. Not a great ways off.

Int. 25. Can you give it more clearly by feet, or fathoms; or your vessel's length, or otherwise?

Ans. I should think she was two vessels' lengths off, when I first saw her.

Int. 26. What vessel's length do you mean?

Ans. The schooner's length. I mean twice the length of the hull of the vessel.

Int. 27. Did any one call out, that led you to look that way, or did you see her of your own motion?

Ans. I heard a man forward sing out, "we're going all clear;" he turned to another man; I didn't see who he turned to, and said, "we're going all clear."

Int. 28. Do you mean that that was what led you to look up and see her, for the first time?

Ans. No, sir; I didn't understand it.

Int. 29. Please answer again the twenty-seventh interrogatory. (The twenty-seventh interrogatory was again read to the witness.)

Ans. I saw her of my own motion.

Int. 30. What was the first said or done on board your vessel after the "Java" was first seen?

Ans. The first I heard was the captain singing out to the steamer, "you'll be into us!"

Int. 31. Do you know whether anything was done to the helm of your vessel? If so, what?

Ans. I don't know, sir.

Int. 32. Did you notice whether your vessel fell off, or came to, or otherwise altered her course before the collision?

Ans. No, sir, I didn't notice.

Int. 33. Did you hear any person on board the steamer say anything?

Ans. Yes, sir.

Int. 34. Where was he standing?

Ans. Forward.

Int. 35. Was he not on her forecastle?

Ans. I couldn't tell, sir.

91 Int. 36. Describe what he said, and how he said it.

Ans. "We're going all clear, sir;" he turned his head aft, turned his head around.

Int. 37. Did the steamer keep on the course she was heading when first seen, or was she winding, and how?

Ans. She was winding slowly.

Int. 38. Was she winding her head towards the school-ship, or towards the flats?

Ans. Towards the school-ship.

Int. 39. Why did you not see the "Java" sooner?

Ans. Because she was in range of the school-ship, I suppose.

Int. 40. When you first saw her, did you see her whole length, or what part of her?

Ans. I saw the whole of her.

Int. 41. About what angle was she heading with the school-ship, when you saw her first?

Ans. I can't tell.

Int. 42. Had you or not any knowledge or suspicion that a steamer was coming that way, until you saw her as you said?

Ans. No, sir.

Int. 43. If she had been coming up to her dock, on a line parallel with the school-ship, and so as to go inside of her, how far off could you have seen her?

Ans. I think, quarter of a mile.

Int. 44. Are you acquainted with the points, ledges, buoys, etc., of Boston Harbor, so as to describe them?

Ans. No, sir.

Int. 45. Do you know how far the view of the "Java" would have been open to you, if she had come up on a line parallel with the school-ship, so as to go inside of her?

Ans. Quite a long distance, I suppose, if she was coming up parallel with the school-ship.

Int. 46. Why did you say "a quarter of a mile" in answer to the 43d interrogatory?

(Objected to.)

Ans. Because when I first spoke, I thought it was a longer dis-
92 tance; I don't mean so; I meant to say it was more than a quarter of a mile.

Int. 47. What distance do you mean that you could have seen her if she had been coming up in that way?

(Objected to.)

Ans. I suppose we could have seen her a mile or two.

Int. 48. Had you way on you when she struck you?

Ans. Yes, sir.

Int. 49. How much were you going through the water?

Ans. About two or three knots.

Int. 50. How high up was your sail when you saw her?

Ans. Part of the ways up.

Int. 51. Was it or not filled by the wind?

Ans. Yes, sir; it was.

Int. 52. How much wind was there then?

Ans. Quite a little breeze.

Int. 53. Was it early ebb tide or late? How much do you think the tide was running?

Ans. Early ebb; it hadn't got running very strong.

Int. 54. Did you see any vessels at anchor near you?

Ans. Yes, sir.

Int. 55. Please state, as nearly as you can, where they were, how many, etc.

Ans. They were in on the flats, just inside of us; I noticed two of them.

Int. 56. Were they afloat or ashore?

Ans. Afloat.

Int. 57. What part of the schooner did the "Java" strike?

Ans. Starboard side, at the main chains.

Int. 58. State what part of the "Java" struck you.

Ans. The stem.

Int. 59. Could you tell to whom on board the "Java" the man was calling, who said "we are going clear of her?"

(Objected to.)

Ans. Well, I should think he was calling to one of the officers.

Int. 60. Why do you think so?

93 Ans. Because I suppose the officers were in the wheel-house, somewhere there where he turned his head.

Cross-examination by Wm. G. Russell, esq., of counsel for respondents:

Cross-int. 1. Which wharf at East Boston did you first leave, and which did you leave when the tug took you in tow? How many wharves below the Cunard steamer's dock were they?

Ans. Lombard's wharf was where we took the seed in, and first left; I don't know the name of the wharf where the tug took us in tow. I couldn't tell how many wharves below the steamer's dock.

Cross-int. 2. Did you leave Lombard's wharf before or after the tide began to ebb?

Ans. I don't know, sir.

Cross-int. 3. Why did you go to the wharf at which the tug took you?

Ans. There is no particular reason I know of why we went there, except trying to get out, and got there.

Cross-int. 4. You were forced to go there, were you not?

Ans. What with the press of the wind, we couldn't get off.

Cross-int. 5. Is not Lombard's wharf above the Cunard steamer's dock, and is not the wharf at which the tug took you several wharves below that dock?

Ans. I couldn't tell now which side. [To question repeated.] The wharf where the steamer took us is of course below where we loaded.

Cross-int. 6. Are there not shears at the wharf where the tug took you, and did not your schooner get a-foul of them?

Ans. There are shears there, yes, sir; I don't recollect whether she got foul of them or not.

Cross-int. 7. Under what sail did you go from Lombard's wharf to the shears wharf?

Ans. I don't know, sir.

Cross-int. 8. Had you any sail up at all?

Ans. It's so long, I don't remember what we had up. [To question repeated.] Yes, sir.

Cross-int. 9. What did you do at the shears wharf before the tug took you?

94 Ans. We didn't do anything, as I know of.

Cross-int. 10. How long were you there? State as nearly as you can.

Ans. I couldn't tell you.

Cross-int. 11. Can you tell within half an hour?

Ans. No, sir.

Cross-int. 12. How long were you in tow of the tug, and how long was it from the time the tug first took you in tow to the time you first saw the "Java?" State as nearly as you are able.

Ans. I couldn't tell how long we were in tow of the tug; I can't tell how long it was from the time the tug took us in tow till I first saw the "Java."

Cross-int. 13. Can you state within half an hour the time the tug had you in tow?

Ans. No, sir.

Cross-int. 14. Did you at any time the tug had you in tow look down the harbor to see if any steamship or other ship was coming up?

Ans. I was looking down the harbor, looking ahead.

Cross-int. 15. Where were you when you were so looking ahead?

Ans. I was forward.

Cross-int. 16. What else were you doing besides looking ahead?

Ans. Hoisting sail.

Cross-int. 17. What do you mean by being forward?

Ans. Well, that is forward, if you want to know what I mean; I was there.

Cross-int. 18. Do you mean at the fore halliards?

Ans. I was there hoisting foresail.

Cross-int. 19. When you saw the "Java," you say you and one man were hoisting the fore peak; what were the cook and the other man doing at that time?

Ans. Hauling in the line.

(Mr. Dabney, counsel for libellants, asked if the question related to the time when the witness first saw the "Java;" the witness then said, "I didn't say so; I said when the boat left us.")

Cross-int. 20. What were you doing at the moment you discovered the "Java?"

Ans. Hoisting the foresail up.

95 Cross-int. 21. Which part of it?

Ans. I couldn't tell you which part of it I was hoisting.

Cross-int. 22. Why not?

Ans. It's been so long.

Cross-int. 23. Read the twenty-first direct interrogatory, and your answer to it, and say if you made that answer, and if it is true.

Ans. The answer I made was, when the tug-boat left us, I and another man were hoisting the peak, and the cook and another man were hauling in the line.

Cross-int. 24. Did you make the answer to the twenty-first direct interrogatory as it is written down by the magistrate, and is it or not true?

Ans. I might have said so; I have forgot whether I did or not. I suppose it must be true, if I said so.

Cross-int. 25. Is your recollection of the subject any less fresh now than it was when you answered the twenty-first direct interrogatory?

Ans. I don't know as it is.

Cross-int. 26. What were the cook and the other man doing when you first saw the "Java?"

Ans. I don't know.

Cross-int. 27. Were they taking in the lines?

Ans. I couldn't tell you.

Cross-int. 28. Were they hoisting the foresail?

Ans. I don't know.

Cross-int. 29. Who first on board your schooner saw the "Java?"

Ans. I couldn't tell you that.

Cross-int. 30. Did any one on board give you any notice that she was seen before you saw her?

Ans. No, sir.

Cross-int. 31. So far as you know, were you the first to see her?

Ans. That I couldn't tell.

Cross-int. 32. Have you any reason to suppose that any one saw her before you did?

Ans. No, sir; no reason that I know of.

Cross-int. 33. Who was stationed on the lookout on your vessel at the time you saw the "Java," and where was he stationed?

Ans. They were all looking out.

96 Cross-int. 34. Was any one in particular that you know of stationed as a lookout; if so, who?

Ans. No one stationed in particular, as I know of.

Cross-int. 35. Who ordered the cook and one man to haul in the tow-lines?

Ans. I suppose I did.

Cross-int. 36. Did you or any one else give them any further orders before you saw the "Java?"

Ans. I don't remember, sir.

Cross-int. 37. Did you testify at the trial of their cause before Judge Lowell in the district court?

Ans. Yes.

Cross-int. 38. Did you then testify that at the time of the collision the school-ship's head was down stream, and your schooner was going down stream?

Ans. I did testify so; yes, sir.

Cross-int. 39. Did you testify that when the "Java" struck you, her cathead struck your main rigging?

Ans. I don't remember, sir.

Cross-int. 40. Was it not so?

Ans. I think it was.

Cross-int. 41. Did you at that time mention, or hear anybody else mention, any vessels at anchor on the flats inside of you? If so, who mentioned it at that trial?

Ans. Not as I remember.

Cross-int. 42. Could you not, when you left the shears wharf, see down the channel, and see the whole of the channel between Castle Island and Governor's Island?

Ans. I didn't notice whether I could or not.

Cross-int. 43. Do you now know whether you could or not?

Ans. I suppose you could have seen, if you'd have looked, it was a clear day enough.

Cross-int. 44. Did you look?

Ans. I don't know nothing about such questions as them.

Cross-int. 45. What do you suppose to have prevented you from seeing the "Java" when she came up the channel between Castle Island and Governor's Island?

97 Ans. I don't know.

Cross-int. 46. Do you suppose that anything prevented you seeing her, except that you were not looking there when she came up?

Ans. I don't know as there was.

Cross-int. 47. You have drawn a diagram, Exhibit V, showing the angle between the "Java's" course when you first saw her, and your schooner. Did that angle change at all before the collision, and if so, how?

Ans. I should think it did; I think it rather winded off; what I mean by that is, when I first saw her she was coming as shown in the diagram, and before she struck us she winded off, so as to strike us a more glancing blow.

Cross-int. 48. When you first saw the "Java," was your schooner heading parallel with the school-ship, or was her head more or less to the eastward than the school-ship's stern?

Ans. I think we were heading parallel, as near as I could tell.

Cross-int. 49. Did not your schooner fall off from that heading before the collision?

Ans. I don't know, sir.

Cross-int. 50. Do you not know that her helm was put hard to starboard?

Ans. I don't know, sir.
Cross-int. 51. Have you ever heard it so stated?
(Objected to.)
Ans. I don't like to answer the question, sir.
Cross-int. 52. Have you not heard your father, Captain Crowell, testify or state that when the "Java" was seen he immediately put the helm hard to starboard?
(Objected to.)
Ans. It seems to me I heard some such talk as that.
Cross-int. 53. When did you hear it?
(Objected to.)
Ans. I don't know.
Cross-int. 54. Did you not hear your father so state at the former trial?
(Objected to.)
Ans. I don't remember what he did state.
98 Cross-int. 55. Have you not often heard him say that he put the helm hard to starboard when the "Java" was first seen, and that the schooner fell off two points in consequence?
(Objected to.)
Ans. No, I heavn't often heard him say it.
Cross-int. 56. Have you not heard him say so?
(Objected to.)
Ans. Not as I recollect.
Cross-int. 57. Was not the helm hard to starboard and in the becket at the time of the collision?
Ans. I don't know, sir.
Cross-int. 58. Did your father ever mention to you those vessels at anchor on the flats inside of you, before you testified here to-day?
(Objected to.)
Ans. I think he did.
Cross-int. 59. When, and where?
(Objected to.)
Ans. I couldn't tell you.
Cross-int. 60. Within a month?
(Objected to.)
Ans. I think it was.
Cross-int. 61. Within a week?
(Objected to.)
Ans. I don't remember.
Cross int. 62. Was it since he gave his deposition in this case?
(Objected to.)
Ans. I don't know whether it was, or not.
Cross-int. 63 Who introduced the subject when he spoke to you about them?
(Objected to.)
Ans. I don't know.
Cross-int. 64. How happened you or he to be speaking about these vessels?
(Objected to.)
Ans. I don't know.
Cross-int. 65. Were you talking about this case?
Ans. I don't know whether we were or not.
99 Cross-int. 66. Can you now conceive any reason for your speaking about those vessels, unless you were talking about this case?
(Objected to.)

Ans. No, I don't know as I can.

Cross-int. 67. Do you not know that you were talking about this case, when those vessels were mentioned?

Ans. It might have been.

Cross-int. 68. Do you not know that it was after your father had given his deposition in this case?

Ans. I can't remember.

Cross-int. 69. When did he give his deposition?

Ans. I don't know.

Cross int. 70. State as nearly as you are able?

Ans. I can't state.

Cross-int. 71. Was it within a month? Was it within a week?

Ans. It might be within a month. I don't know whether it was within a week or not.

Cross-int. 72. Did he not tell you that he had given his deposition at or about the time he gave it?

(Objected to.)

Ans. He might have mentioned it.

Cross-int. 73. Did he not mention it?

(Objected to.)

Ans. I think he did.

Cross-int. 74. Did he not also mention the fact, that in that deposition he had made a statement about those vessels at anchor?

(Objected to.)

Ans. I don't remember.

Cross-int. 75. Are you still the mate on the same schooner, with your father as master; is she now in port, and how long has she been here?

Ans. No, sir; I am not. I have got a vessel myself now. I came in as mate with my father in the same schooner, a week ago last Monday.

Cross-int. 76. It is not since that time that you have conversed with him about his deposition, and about those vessels at anchor?

(Objected to.)

Ans. Yes, sir.

100 Direct examination resumed, by L. S. Dabney, esq., of counsel for libellants:

Int. 61. You may explain how you come to state at the trial before Judge Lowell, that the school-ship was heading down stream?

Ans. Well, I was wrong. I said the tide was running ebb, and the school-ship was heading down stream. I knew, but I was a little flustered, and said it wrong.

Cross-examination resumed by W. G. Russell, esq., of counsel for respondents:

Cross-int. 77. Did you not, at that time, take two pens, and illustrate the relative situation of the two vessels, by placing them in position, showing your schooner and the school-ship both heading the same way?

Ans. I think I did.

Cross-int. 78. Did you not leave the witness-stand, without discovering or correcting your mistake?

Ans. I ain't sure, but I think I did.

PELEG T. CROWELL.

Deposition of Moses B. Tower, taken July 26, 1869, before me, Chas. F. Walcott, notary public.

Direct-examination by R. H. Dana, jr., esq., of counsel for libellants.

Int. 1. Please to state your name, age, and residence?

Ans. Moses B. Tower; fifty-four years; I reside at East Boston.

Int. 2. Please to state what offices you have held, connecting you with Boston harbor and its commerce?

Ans. Commissoiner of wrecks, and agent of Boston and New York Board of Underwriters.

Int. 3. How long have you held each office?

Ans. Commissioner of wrecks, since 1843; agent, since 1850.

Int. 4. Please state the degree and nature of your acquaintance with Boston harbor?

101 Ans. For the last twenty years I have been constantly passing up and down, in my business; I have also acted as pilot of ships some, not having a commission, but by consent of master and owners.

Int. 5. How large vessels have you piloted in by consent?

Ans. Draft of water eighteen feet; ship "Hope" is one of that draft. I have brought up wrecked vessels of deeper draft.

Int. 6. How much have you observed the Cunard steamers coming up?

Ans. I think I've averaged seeing one-half of them coming up; my residence is so situated that I can see from Minot's Light to Boston, pretty much the whole distance.

Int. 7. Are you familiar with the position of the school-ship at her moorings?

Ans. Yes, sir. The moorings are in sight of my house.

Int. 8. Have you observed, and do you know, how it has been as to Cunard steamers coming up inside the school-ship? I mean between her and the flats. Please state.

(Objected to as immaterial and otherwise.)

Ans. I have never seen but one pass that side of her. I have observed and known about the Cunard steamers coming up inside of her. I have occupied a wharf, for five years, within two cable-lengths of the school-ship.

Int. 9. What one was that, and when—that is, was it before or after this collision?

Ans. I don't recollect her name; it was last; winter one came inside her at high water since this collision.

Int. 10. Do you know the "Java?"

Ans. I do; I have been aboard of her, and done work on her.

Int. 11. What is your opinion respecting a large Cunard screw like the "Java" going inside the school-ship at one hour's ebb, under any circumstances?

(Objected to.)

Ans. Under any circumstances comes pretty close; I should think it would be a great risk, in passing between the school-ship and the flats at an hour's ebb; with me, it would be the last resort to take that course.

102 Int. 12. Please state why it would be dangerous for a large screw steamer.

(Objected to.)

Ans. The passage-way is very narrow, for one; frequently vessels are anchored between where the school-ship lies and the Grand Junction wharves. The commissioner's line runs down by the school-ship,

and inside of her is considered anchoring ground; there is much shoaler water there than there is in the main channel, and if a screw steamer gets into shoal water she won't steer well—won't answer her helm readily.

Int. 13. What is the usual course of the Cunard steamers up the harbor, from Boston Light?

(Objected to, witness not being shown to be competent.)

Ans. There are several different courses; west by south; northwest; they generally keep the lead going, and go in the best water; north-northwest, through The Narrows; they have to change the course some six times; their rule is to keep the lead going, until they get abreast of their wharf; they leave the Upper Middle buoy on shoal ground on the port hand, the Slate Ledge buoy on the port hand, Governor's Island and Bird Island on the starboard hand; they usually leave the shoal spot which lies to the southward of the school-ship, having about twelve feet on it at low water, on the starboard hand, and then steer directly for Cunard Wharf.

Int. 14. Please give your opinion on this case, as to its prudence: Time, near noon; moderate wind, and tide about one hour ebb; the "Java" comes up the usual course by Slate Ledge, and then steers so as to go between the school-ship and the flats, making an angle with the line of the school-ship of from thirty to forty degrees, and so that she cannot see the water inside the school-ship, or anything on the starboard side of the school-ship which she does not see over and across the school-ship.

(Objected to on ground that witness is not competent and because many of the elements of the case are not definitely stated.)

Ans. I should think it very imprudent to take that risk; there would almost always be more or less risk, on account of vessels being anchored there.

Int. 15. How as to danger to small vessels that might be passing down inside the school-ship, if any?

103 (Objected to as above.)

Ans. The danger would be not being able to see them behind the school-ship; she being so much larger would be likely to cover them; she is some thirty feet above the water.

Int. 16. If the "Java" comes down across the stern of the school-ship at an angle of from thirty to forty degrees, and on opening the water inside the school-ship, finds a vessel there under way, about abreast of the school-ship; would, or not, the "Java" have room to manœuvre so as to avoid the school-ship, schooner, and flats?

(Objected to, witness not being competent.)

Ans. I should think not; no.

Int. 17. If she came down, and saw herself in that situation, and she was going a slow rate, with engines stopped; what would be the best she could do to avoid collision?

(Objected to as last.)

Ans. Reverse her engine, and let go her anchor.

Int. 18. In the case supposed, at an hour's ebb and at a rate of about three knots, and engines stopped, what would be the effect of reversing and letting go an anchor?

(Objected to as last.)

Ans. It ought to stop the steamer.

Int 19. Is it or not, in your judgment, safe navigation for a large screw steamer to come up the harbor to Cunard wharf, without anchors ready to let go at an instant's notice?

Ans. It is not prudent.

Int. 20. If a schooner starts with a tug from one of the Grand Junction wharves, and the tug lets her go on the starboard bow of the school-ship, three or four knots westerly breeze, and tide one hour's ebb, and being abreast the school-ship, with steerage way on, she sees the "Java" coming round the stern of the school-ship, what is the best course for the schooner?

Ans. To starboard her helm.

Int. 21. Please look at the chart marked "Mr. Boschke's plan." How does the school-ship there tend for one hour's ebb and westerly wind?

Ans. The first hour's ebb she would tail from E. by N., to E. NE., afterwards more easterly. At the first of the ebb the tide sets out through the Bird Island Channel; I mean the tide in the vicinity of
104 where the school-ship lies. On the plan, the school-ship tails too far to the southward, under the circumstances of the question.

Int. 22. How many points too far to the southward, for one hour's ebb?

Ans. About four points, I should think.

Int. 23. How would her position on that plan do for two hours' ebb; if not right, how many points which way?

Ans. For two hours' ebb, I should think she would tail about east.

Int. 24. To what extent do small vessels go up and down inside the school-ship?

Ans. Perhaps one out of five of the number that go out and in—vessels not drawing over ten feet of water.

Int. 25. Do you know the steamers that run to New York, Philadelphia, and Baltimore; how do they compare in draft with the "Java?"

Ans. I do know them all; they draw less water than the "Java," some four to six feet less.

Int. 26. Please answer the same as to the steamers going to the eastward—to Maine and the British Provinces.

Ans. I know them all; very much lighter than the "Java," some eight to ten feet lighter; side-wheel boats to the State of Maine and St. John's; two boats run to Halifax and Prince Edward Island, screws, drawing from twelve to fifteen feet of water; one, a screw, running to Yarmouth and St. John's; she is about eleven feet draft.

Int. 27. How does a screw compare with a paddle, as respects rapidity and certainty in stopping and backing?

(Objected to, witness not shown to be competent.)

Ans. Side-wheel boats stop much quicker than screw boats; they can reverse with full power; the side-wheel can stop in half the time of a screw, and are very sure to stop; reversing doesn't affect their steering, as it does on a screw.

Int. 28. Is there any difference between paddle and screw as to certainty of course they will take, on the engine being reversed?

(Objected to as above.)

Ans. The side-wheel boat will mind her helm much better in reversing than the screw, and will turn much quicker.

105 Cross-examination by W. G. Russell, esq., of counsel for respondents:

Cross-int. 1. In your twenty-fifth answer, what do you assume to be the draft of the "Java?"

Ans. From eighteen to twenty feet is her usual draft when she comes in, I've noticed.

Cross-int. 2. Do not some of the propellers from New York, Philadelphia, and Baltimore draw eighteen feet, loaded?

Ans. I have never noticed them drawing over sixteen; from twelve to sixteen is their average; it depends on how deep they are loaded.

Cross-int. 3. Did you not testify at the trial of this cause in the district court?

Ans. I did.

Cross-int. 4. (De bene.) Was there not at that time a daily line of propellers between Boston and New York?

Ans. I think not daily; three a week, outside. There was, at one time, another line, the "Metropolitan," which, together with the other line, made daily communication; part of their steamers were propellers, part side-wheel.

Cross-int. 5. (De bene.) Did you not, at the former trial, state that those propellers, and the Philadelphia and Baltimore propellers, frequently came inside the school-ship, and that the eastern steamers, running daily, came inside in the majority of their trips; was not this the case?

Ans. The southern boats do frequently come inside, not half the time, though; of the Philadelphia and Baltimore boats about one in ten come inside of her, at high water, so as to make their turn better. I did state at the former trial, as to the New York, Philadelphia, and Baltimore propellers, that at high water they frequently came inside the school-ship. I think I did not state that the eastern steamers came inside in a majority of their trips. The eastern boats, which are side-wheelers, and much lighter draft of water, five or six feet lighter, come inside more frequently than the southern boats.

Cross-int. 6. (De bene.) Do not the eastern boats, in your opinion, come inside about as often as outside?

Ans. I think not as often.

106 Cross-int. 7. (De bene esse, subject to admission of eighth direct interrogatory.) Do you not think it an overestimate to say that you see one-half the Cunard steamers coming up the harbor?

Ans. I think I average to see one-half that come in the day-time.

Cross-int. 8. What proportion arrive in the night?

Ans. Perhaps one in five. I can see many of them that arrive in the night from my window, with a night-glass; I have business with many of them, and watch for them some.

Cross-int. 9. (De bene esse.) Are you not absent from Boston a very considerable part of the time, in the course of your business?

Ans. I am; most of my business—a large portion of it—is round in Boston Harbor.

Cross-int. 10. (De bene esse, subject to admission of direct interrogatories sixteen, seventeen, and eighteen.) Suppose a steamer, like the "Java," coming up the harbor, at one hour's ebb, at a speed of three knots, and at an angle of thirty degrees with the line of the school-ship, and as her bow passes the school-ship's stern, and from one hundred to two hundred feet from it, suppose she discovers a schooner coming down about abreast of the school-ship; do you mean to say that, in your opinion, she could reverse her engines and drop her anchor, with safety to herself and the school-ship?

Ans. I think she could. In reversing, she should go back in the same track which she came in; I would say nearly in the same track; they sheer a little.

Cross-int. 11. (De bene esse, as above.) What distance do you allow for the steamer to go ahead, after discovering the schooner, in the case supposed?

Ans. She ought to be stopped in once her length, or three hundred feet.

Cross-int. 12. (De bene, as above.) How much chain would you allow for that purpose?

Ans. Twelve to fifteen fathoms, in that depth of water.

Cross-int. 13. (De bene, as above.) How much would you allow for her dragging her anchor?

Ans. She ought not to drag her anchor much, going at that rate of speed, three knots.

Cross-int. 14. (De bene, as above.) How much?

107 Ans. Not over fifty feet.

Cross-int. 15. (De bene, as above.) Is that in addition to the three hundred feet you allow for her to go ahead, after discovering the schooner?

Ans. No, it is not.

Cross-int. 16. (De bene, as above.) Do you mean to say that you included fifty feet for dragging her anchor in your first estimate of the distance?

Ans. I do.

Cross-int. 17. (De bene, as above.) You suppose her anchor to be dropped with all possible despatch after discovering the schooner, do you not?

Ans. I do; they should have men ready to drop it at any instant.

Cross-int. 18. (De bene, as above.) In your opinion, should it be dropped without an order from the pilot in charge, or do you allow time for him to receive a report of the discovery of the schooner from forward, and to give the order?

Ans. The pilot and master both are supposed to be on the bridge in the center of the ship in entering and leaving harbors; men stationed forward on look-out; other men stationed at the cat-rope of the anchor, so as to let the anchor go by a tap, knocking out a key, in an instant, and letting the anchor go. They should have the chain overhauled when they make sight of land, with scope enough to get bottom; the anchor should not be dropped without an order from the pilot or captain. I include time for the report from forward, and the order to be given by the pilot; I supposed the engine to be going back at the same time.

Cross-int. 19. (De bene, as above.) In what space of time, reckoning by minutes or seconds, do you suppose that the engines could be reversed, so as to be moving backward, after discovering the schooner, and allowing time for her to be reported and the necessary orders to be given and executed?

Ans. Supposing the engine to be stopped, not working at all, one minute's time; not more than one minute's time.

Cross-int. 20. (De bene, as above.) How many minutes or seconds do you allow after that before the steamer would be brought to a dead stand by engine and anchor?

108 Ans. Not more than one or two minutes; one or one and a half minutes.

Direct examination resumed by R. H. Dana, jr., esq., of counsel for libellants:

Int. 29. When the deeper draft coasting steamers come up inside the school-ship, do they come up so as to see the line inside the school-ship, or do they come across the stern of the school-ship at such an angle as not to be able to see objects on her inside, except what they see over her? State how they come up, as respects being able to see the track inside the school-ship.

Ans. They usually come up on the north side of the channel, and

they can see whether it is clear or obstructed, being on the north side of the channel.

Int. 30. Is there any custom in the Cunard boats as to division of duties between pilot and master in choosing water as they get nearer towards the wharves? If so, state how you know.

Ans. The pilot directs as to water; the master, in most cases, docks them, being supposed to be more familiar with the action of the engine. I have had it from pilots and masters of steamers, and have seen them operating in that way in docking. I have frequently been on the wharf when they've come in.

Int. 31. Suppose the "Java" to have stopped her engine some five minutes or more before seeing the schooner, and the "Java" to have reduced her speed to from two to three knots, and to be in process of reduction, and the tide to be two to three knots ebb, and she then opens and sees the schooner; please calculate from the time the order is given and obeyed, to back and let go anchor, how many feet do you think she would go over the ground afterward?

Ans. Three hundred feet, the tide running against her at the rate of two knots, and wind against her.

Int. 32. In your answer to the tenth cross-int., did you assume the tide to be ebb or flood, and what rate?

Ans. I did; ebb tide; about two knots.

MOSES B. TOWER.

109 *Deposition of James Kelley, taken July* 26, 1869, *before me, Chas. F. Walcott, notary public.*

Direct examination resumed by Mr. Dana, for the libellants:

Int. 1. Please state your name, age, and occupation.

Ans. James Kelley; thirty-two years of age; master mariner.

Int. 2. How long have you followed the seas; how long in command of coasters?

Ans. I have been in command of a coaster between eight and nine years, off and on; I have followed the seas twenty-one years.

Int. 3. What vessel have you lately commanded, and how long?

Ans. I am now in command of the schooner "Wm. D. Cargill;" I have been in command of her five years last spring.

Int. 4. How long have you known the schooner "James McCloskey?" and what means have you had of knowing her?

Int. I have known her at least six years, having been in company with her.

Int. 6. State whether the two vessels are alike, and how far, in their qualities.

Ans. They are nearly alike; carry about the same quantity of cargo; both of them centre-board vessels; and their sails are about alike, and they are rigged about alike.

Int. 6. Are you acquainted with Boston Harbor; what opportunities have you had to know about it?

Ans. I am somewhat acquainted with it; I am enough acquainted with it to take my schooner up or down, night and day. I have sailed out of here the last twelve years; and having taken the vessel up and down.

Int. 7. Have you observed the position of the school-ship, when at her moorings?

Ans. I have observed her position, but I could not give her exact position—bearings from the Grand Junction dock.

Int. 8. Have you observed the Cunard steamers coming up and down; how much so?

110 Ans. Yes, I have observed them; twelve times, at least.

Int. 9. Have you ever seen a Cunard steamer go inside the school-ship?

(Objected to as immaterial and irrelevant.)

Ans. I do not recollect ever seeing one pass inside the school-ship.

Int. 10. What is the character of the "James McCloskey," as to being quick or slow in minding her helm, and as to sailing?

Ans. All centre-board vessels are allowed to be quickly managed. She is a good sailer, and, as far as my experience goes, a very easily managed vessel.

Int. 11. Suppose the "James McCloskey" to be going down the harbor from the Grand Junction wharves, inside the school ship, with a fair three or four knots breeze, and at one hour's ebb tide, and her foresail about two-thirds up; do you, or not, think she would be under steerage-way?

(Objected to.)

Ans. She would.

Int. 12. Suppose her to be coming from the Grand Junction wharves, to go inside the school-ship, with fair wind and tide; what sail should you hoist first, the foresail or mainsail?

Ans. The foresail; the foresail would force her straight ahead, while the mainsail, before she got much headway on her, would slew her up into the wind, in a light breeze.

Int. 13. Suppose her to be about abreast of the starboard beam of the school-ship, with the wind on her starboard side, and to see the head of a Cunard steamer coming round the stern of the school-ship, what, in your judgment, could she do?

(Objected to as indefinitely stating the case supposed.)

Ans. Put her wheel to starboard would be the only remedy, in case the steamer was coming on an angle, so that she could turn and go inside the schooner; I mean between the flats and the schooner; the "James McCloskey's" wheel could be put to port, so that the "James McCloskey" could pass close to the school-ship, between the steamer and the school-ship, if the steamer gave her room; if the steamer should pass too close to the school-ship, it would be impossible for the "McCloskey" to put her wheel to port, to clear the steamer.

Int. 14. If the "James McCloskey" saw that the steamer would

111 hit her on her starboard side abaft her beam, if neither changed course, what should the "James McCloskey" do with her helm?

Ans. Still keep it to starboard, if the wind was light; by putting it to port, the steamer would be apt to strike the schooner's bow; in that case the schooner and steamer would meet head on and would do more damage than by striking the schooner on the quarter.

Int. 15. Do you know whether there was room enough between the school ship and the flats for the steamer to come round and go clear of schooner, flats, and school-ship?

(Objected to, the witness not having been present at the collision.)

Ans. I should think there was not; I should consider it would be risky business for a steamer to go between the schooner and the flats, if she was coming on an angle of forty-five degrees, or forty degrees.

Int. 16. Suppose she was coming at an angle of thirty degrees, do you or not think she could go safely between the school-ship and flats, and avoid the schooner?

(Objected to, as not definitely stating the facts of the case supposed.)

Ans. Well, that would be owing to how far the schooner came from the school-ship.

Ans. 17. What is your opinion as to the safety of a Cunard screw steamer going inside the school-ship at any angle which prevented her from seeing whether the way inside was clear or not, or what was there?

(Objected to, the competency of the witness not being shown.)

Ans. I should consider it very risky on the part of the steamer.

Cross-examination by Wm. G. Russell, esq., of counsel for respondents:

Cross-int. 1. Were you examined as a witness in this cause at the trial in the district court?

Ans. Yes, sir, I believe I was. I was examined in a court, I don't know what the name of it was.

Cross-int. 2. Were you then, as now, examined as to the circumstances under which the "James McCloskey" would be under steerage-way?

Ans. I was.

Cross-int. 3. Suppose that with a three or four knot breeze the "McCloskey" was just hoisting her foresail; that it was not more than one-half up at the throat and the peak not started; and that the wind
112 was abeam, and the sheets not hauled aft at all; would you then consider her under steerage-way?

Ans. If the foresail didn't do any good, I should not consider her under steerage-way.

Cross-int. 4. Would it do any good, under the circumstances stated, unless the sheets were hauled aft?

Ans. If the wind is right square abeam, with the sheets off as far as they could go, the foresail would do but little good.

Cross-int. 5. (De bene esse, subject to admission of the ninth direct interrogatory.) Have you frequently seen other large steamers besides the Cunard steamers passing up and down Boston Harbor?

Ans. I have.

Cross-int. 6. (De bene, as above.) Has there not been a daily line of large propellers between New York and Boston?

Ans. Well, I could not say how often they run; I know there is a line of steamers.

Cross-int. 7. (De bene, as above.) Are there not also lines of steamers to Philadelphia and Baltimore?

Ans. There are.

Cross-int. 8. (De bene, as above.) Have you never seen any of these steamers pass up or down the harbor, inside of the school-ship?

Ans. I do not recollect ever seeing any of the New York, Baltimore, or Philadelphia steamers pass up inside the school-ship—up or down either.

Cross-int. 9. (De bene, as above.) Did you ever, before the former trial of this case, see any of the Portland, Bangor, or Eastport boats pass inside the school-ship?

Ans. I do not recollect of ever seeing any, before or since.

Cross-int. 10. At the former trial, did you not state that you had seen the "Java" here frequently?

Ans. I think I may have stated that fact.

Cross-int. 11. Was it true, if you so stated it, or were you mistaken about it?

Ans. I think I read the steamer's name; I have carried cargoes of coal for the Cunard steamships.

Cross-int. 12. Had you seen the "Java" here frequently before the time when that case was tried in the district court?

Ans. I think I had.

113 Direct-examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 18. As between the different Cunard steamers, with what degree of certainty do you speak of having frequently seen the "Java" in this port?

Ans. I do not know of any, more than reading the names of steamers. (Question repeated.) With no degree of certainty, more than reading her name; I could not tell her from one of the others, unless I read her name.

Int. 19. If a foresail of such a schooner as the "James McCloskey" is half up at the jaw, and her peak not hoisted, and she had a fair wind of three or four knots abeam, does or not the sail usually belly out with the wind, although the sheet may not be hauled taut?

Ans. If the wind was aft, it would force her ahead; but if the wind was right square abeam, with the peak down, and the throat only half up, I should not suppose it would do but very little good.

Int. 20. Does it or not all depend upon whether the wind does in fact fill out the sail and keep it so, or does in fact blow it straight out to leeward and only keep it slatting?

Ans. The sail should belly out and keep full to do good; if it was slatting, it would hinder the vessel from steering.

Int. 21. Does it, or not, often happen that when hoisting up, with a wind directly abeam, the sheet-blocks hang or catch so as to enable the wind to fill out the sail, when no one has touched the sheet?

(Objected to.)

Ans. If the wind is light abeam, the sail would be apt to stand full, as it takes some little force to shove the boom off far enough for the sail to slat.

JAMES KELLEY.

114 *Deposition of Jacob K. Lunt, taken March 1st, 1870, before me, Chas. F. Walcott, notary public.*

Direct-examination by L. S. Dabney, esq., of counsel for libellants:

Int. 1. What is your name, age, residence, and occupation?

Ans. Jacob K. Lunt; sixty years of age; East Boston, Mass.; pilot. I have been pilot for forty years; pilot in Boston Harbor since 1841.

Int. 2. Have you had any experience piloting steamers?

Ans. Yes, sir; considerable.

Int. 3. What class of steamers?

Ans. All sorts.

Int. 4. Have you ever piloted the Cunard steamship "Java"?

Ans. Yes, sir.

Int. 5. Have you ever tried to stop the "Java" by letting go an anchor when she had way on her?

(Objected to.)

Ans. Yes, sir.

Int. 6. Please state the circumstances.

(Objected to as calling for facts irrelevant to case in hearing.)

Ans. Well, I was coming up in the "Java" in the night, and when we got up as far as East Boston Ferry—we had stopped the propeller, and made a small vessel ahead, and there was no way to clear her—as after

you have stopped the propeller a vessel won't steer—and I sang out to let go the anchor; they had it all ready; they let go the anchor, and we brought her up and got clear of her.

Int. 7. How far did you go, after letting go the anchor, before you brought up?

(Objected to as above.)

Ans. Well, I shouldn't say she went half her length.

Int. 8. How fast was the "Java" going over the ground when you let go the anchor?

(Objected to as above.)

Ans. We calculate she was going about three knots; in my opinion she was going at that rate.

115 Int. 9. Did you let go more than one anchor?

(Objected to as above.)

Ans. Only one.

Int. 10. How was the tide?

(Objected to as above.)

Ans. Half flood.

Cross-examination by Wm. G. Russell, esq., of counsel for respondents:

Cross int. 1. Are you pilot of the harbor of Boston at the present time?

Ans. No; but my commission, I calculate, is as good as it ever was; I am going to have a trial in the supreme court.

Cross-int. 2. Has not your commission been revoked by the pilot commissioners?

(Objected to.)

Ans. Pilot Commissioner Captain Davison; nobody else.

Cross-int. 3. When was it revoked?

(Objected to.)

Ans. Well, May, I believe, or June, 1868; I believe it was May; I can't recollect the exact time.

Cross-int. 4. For what alleged cause was it revoked? I do not inquire as to the merits of the case, but only as to the cause assigned by the pilot commissioner for the revocation.

(Objected to.)

Ans. Well, in the first place, I had a fast boat; the pilots went and told the commissioner she wasn't sea-worthy; two pilots so told him; so he wrote me a letter she was out of commission. Well, I went down and asked him what the trouble was with the "Haze," my pilot-boat; and he told me two pilots had been there and told him she was not sea-worthy; she wouldn't wear nor stay. Then he carried it before the trustees, and I asked two of them what I had done that stopped me from piloting; they said I'd done nothing concerning my business; then one of them said (that was Captain Beals) that somebody said I had said that Captain Davison got drunk; that that was the whole trouble; but that was a thing I never said in my life.

Cross-int. 5. Had there or not been a collision between your
116 pilot-boat, the "Haze," and one of the Cunard steamers before she was put out of commission?

(Objected to.)

Ans. Yes, sir.

Cross-int. 6. (Put de bene esse, subject to admission of direct ints. 5 to 10, inclusive.) When was it that you anchored the "Java," and who was her master on that trip?

Ans. The 2d of July, 1866; Captain Moody.

Cross-int 7. (De bene, as above.) Who was chief officer?

Ans. Well, that's what I never knew—the chief officer's name on any boat; I couldn't tell you one.

Cross-int. 8. (De bene, as above.) How near is the East Boston Ferry to the Cunard Steamship Dock; how many wharves are there between the two?

Ans. There is only the Eastern Railroad Wharf; six hundred feet, I should guess it was.

Cross-int. 9. (De bene, as above.) Had you ever seen the "Java" before the time when you anchored her; had she ever been here before that time?

Ans. I believe I saw her before; I think she'd been here three or four times before I took her; it strikes me she'd been here three times before.

Cross-int. 10. (De bene, as above.) Do you not keep a list of all Cunard steamers arriving here; how long have you kept such list?

Ans. I don't keep anything but my own what I bring in.

Direct examination resumed by L. S. Dabney, esq., of counsel for libellants:

Int. 11. (De bene.) Did either the pilot commissioners or the trustees ever find any fault with your competency to pilot vessels in Boston Harbor?

Ans. No, sir; nor no other men.

JACOB K. LUNT.

117 *Deposition of Frank L. Bird.*

Direct examination by L. S. Dabney, esq., of counsel for libellants:

Int. 1. Please state your name, age, residence, and occupation?

Ans. Frank L. Bird; twenty-seven years old; East Boston, Mass.; occupation, yachtman.

Int. 2. Do you follow the sea; if yes, how long have you done so?

Ans. Yes, sir; for nine years.

Int. 3. Have you been employed on any tug-boats?

Ans. I have been employed on tug-boats in Boston, and in Charleston, South Carolina; very little in Boston.

Int. 4. How long, and in what capacity?

Ans. Mate, in Boston, for about two months; that is all in Boston; a year in Charleston, as mate.

Int. 5. Have you had command of any tug-boat in Boston?

Ans. I can't say that I have.

Int. 6. Are you or not familiar with Boston Harbor?

Ans. I am.

Int. 7. Have you ever known of an attempt made to stop a Cunard steamer by an anchor, while she had way on her?

(Objected to as irrelevant, and as inquiring as to the facts of another case than that in trial, and otherwise inadmissible.)

Ans. Yes, sir.

Int. 8. What steamer?

(Objected to as above.)

Ans. I think the "Java."

Int. 9. Please state the circumstances.

(Objected to as above.)

Ans. Coming from East Boston, in the yacht "Ambrotype," about nine o'clock in the evening, coming over to Long Wharf; wind light; a

large steamer coming up the harbor; I thought she was going to run into me; heard the pilot sing out for me to get out of the way; the wind being light I couldn't get out of the way, as I didn't have wind enough to handle my boat quick enough; afterwards heard the order to let go the anchor on board the steamship, which was done, and the ship
118 was brought up, thereby saving a collision with me; afterwards made my way over to Long Wharf.

Int. 10. Whereabouts in the harbor was this? And state as nearly as you can when it occurred.

(Objected to as above.)

Ans. Somewhere near the ferries—East Boston Ferry, I should judge; three years ago last summer.

Int. 11. How was the tide at the time?

(Objected to as above.)

Ans. Flood.

Int. 12. How fast does the tide run there?

(Objected to as above.)

Ans. From two and a half to three knots, I should judge.

Int. 13. How fast was the "Java" going?

(Objected to as above.)

Ans. I couldn't say.

Int. 14. Was she floating with the tide, or going faster than the tide?

(Objected to as above.)

Ans. I should say she was going faster than the tide.

Int. 15. Do you know who the pilot was that was on her?

(Objected to as above.)

Ans. Yes, sir; Jacob Lunt.

Int. 16. How far did she go after they let go the anchor?

(Objected to as above.)

Ans. I shouldn't say she went any farther than half a length.

Int. 17. Can you say whether the tide was an hour flood, or half flood, or more?

(Objected to as above.)

Ans. To the best of my judgment it was about half tide.

Int. 18. Is it or not necessary for a ship to move faster than the current, in order to keep steerage-way?

(Objected to as irrelevant.)

Ans. Yes, sir; it is, going with the tide.

119 Cross-examination by W. G. Russell, esq., of counsel for respondents:

Cross-int. 1. (De bene esse, subject to the admission of the testimony of witness as to the facts concerning the "Ambrotype" and steamer supposed to be the "Java.") How do you know who was the pilot of the steamer you supposed to be the "Java?"

Ans. I knew by the voice, and afterwards telling me he came up in her; I knew by the voice at the time.

Cross-int. 2. (De bene, as above.) With whom, besides Mr. Lunt, have you talked over the matter to which you have testified?

(Objected to, as assuming facts not in evidence.)

Ans. Nobody.

Cross-int. 3. (De bene, as above.) Did you ever talk it over with Mr. Lunt?

Ans. Yes, sir.

Cross-int. 4. (De bene, as above.) When?

Ans. Two or three days afterwards.

Cross-int. 5. (De bene, as above.) Have you never talked with him about it since that time?

Ans. Yes, sir.

Cross-int. 6. (De bene, as above.) When?

Ans. This week, some time; Wednesday, I believe, this week.

Cross-int. 7. (De bene, as above.) And have you talked about it with no one else except Mr. Dabney?

Ans. No, sir.

Cross-int. 8. (De bene, as above.) Who asked you to come up and state what you knew about the case you have testified to?

Ans. Mr. Patterson; I never knew his name till I heard it yesterday.

Cross-int. 9. (De bene, as above.) Did you not talk over the matter with him, and tell him what you knew about the case?

Ans. No, sir.

Cross-int. 10. (De bene, as abcve.) Then the question of the time of day, the time of tide, and the place where you met the steamer has never been talked over by you, since the summer of 1866, until you saw Mr. Lunt this week, has it?

(Objected to.)

120 Ans. No, sir.

Cross-int. 11. (De bene, as above.) How were you standing when the steamer hailed you?

Ans. Standing to the southward and westward.

Cross-int. 12. (De bene, as above.) How was the wind?

Ans. About south.

Cross-int. 13. (De bene, as above.) How was the steamer heading when she hailed you?

Ans. She was heading about west to west by north.

Cross-int. 14. (De bene, as above.) Which ferry was she nearest to, the upper or lower ferry?

Ans. The eastern—the lower ferry.

Cross int. 15. (De bene, as above.) How far above the Cunard dock was she when she hailed you?

Ans. I couldn't say the exact distance, it being dark.

Cross-int. 16. (De bene, as above.) Could you not see the Cunard dock from where you were, when you were hailed?

Ans. Not being interested, I didn't look, and didn't think anything about the Cunard dock.

Cross-int. 17. (De bene, as above.) You know where it is, do you not?

Ans. Yes, sir; East Boston.

Cross-int. 18. (De bene, as above.) Do you mean that, not being interested, you cannot tell how far from it you were when the steamer hailed you?

Ans. No, sir; I can't.

Cross-int. 19. (De bene, as above.) What wharf in East Boston did you leave with your yacht?

Ans. Brown and Lovell's.

Cross-int. 20. (De bene, as above.) How far is that from the Cunard Wharf; is it above or below it; is it above or below the ferries?

Ans. I don't know the distance. I never measured it or heard it; it is above the Cunard Wharf; it is between the two ferries.

Cross-int. 21. (De bene, as above.) How many wharves are between Cunard Wharf and Brown and Lovell's wharf?

Ans. Brown and Lovell's wharf is the sixth wharf from Cunard dock, I believe.

121 Cross-int. 22. (De bene, as above.) Had you stood on one course from the time you left Brown and Lovell's wharf to the time you were hailed?

Ans. I don't know whether I had, or not; being in no hurry I didn't care how I sailed the boat, or what time I got over, until I made the steamer.

Cross-int. 23. (De bene, as above.) Do you not know whether you could lay your course from Brown and Lovell's wharf to Long Wharf with the wind as it was?

Ans. No, sir; I could not lay my course to Long Wharf.

Cross-int. 24. (De bene, as above.) Were you heading for a point to the northward or southward of Long Wharf, when you were hailed?

Ans. To the northward of Long Wharf.

Cross-int. 25. (De bene, as above.) In your best judgment, how far had you gone from Brown and Lovell's wharf, when you were hailed?

Ans. I should say I was about half way across the harbor, in my judgment.

Cross-int. 26. (De bene, as above.) If you draw a line from Brown and Lovell's wharf to the end of Long Wharf, were you above or below that line when hailed?

Ans. That is a hard thing to say; I don't know; I should say I was to the northward of it.

Cross-int. 27. (De bene, as above.) How far was the steamer from you when she hailed?

Ans. I should say about a length and a half of her length.

Cross-int. 28. (De bene, as above.) Was her engine in motion or not?

Ans. I couldn't say.

Cross int. 29. (De bene, as above.) Do you mean to say now that from your judgment as to the place where you were, and her distance from you, you cannot tell whether she was farther from Cunard Wharf than she was from you, when she hailed you?

Ans. I couldn't say; being dark that way—towards Cunard Wharf—couldn't tell much about it

Cross-int. 30. (De bene, as above.) In your judgment were you or not, more than three times the length of the steamer from Cunard Dock, when you were hailed?

122 Ans. I couldn't say whether we were three lengths or fifty lengths, not taking any notice of Cunard Dock; I didn't see Cunard Dock at all that night; didn't look that way at all.

Direct examination resumed by L. S. Dabney, esq., of counsel for libellants:

Int. 19. State what conversation you have had with Captain Lunt this week on this subject.

(Objected to, as calling for statements of Captain Lunt, and because the conversation was not inquired into on cross-examination.)

Ans. Captain Lunt asked me if I recollected the night he came up in a steamer; asked me if I recollected his telling me to get out of the way, and afterwards his letting go his anchor, and then asking me if I would go and testify to that. I told him I would, and he said they would send somebody for me.

Int. 20. Is that all?

(Objected to as above.)

Ans. That is all the conversation.

Int. 21. Did he say anything to you about the time of day, the time of tide, or the place where you met the steamer?

(Objected to as above.)

Ans. No, sir.

Cross-examination resumed by Wm. G. Russell, esq., of counsel for respondents:

Cross-int. 31. (De bene esse, subject to admission of libellants' twenty-first interrogatory.) Do you now mean to swear that Captain Lunt did not mention to you the year in which you met the steamer as spoken of?

Ans. I do so swear.

Int. 32. (De bene, as above.) Nor the steamer's name?

Ans. Nor the steamer's name.

Cross-int. 33. (De bene, as above.) Nor the time of day; nor the time of tide; nor the place?

Ans. No, sir; he didn't mention either.

Cross-int. 34. (De bene, as above.) Nor any other fact or circumstance relating to the case?

123 Ans. No, sir.

Cross-int. 35. (De bene, as above.) How did you fix the year in which this thing occurred?

Ans. Sailed the yacht "Princess" two years; the year before that sailed the "Ambrotype;" only had her one year; that is the way I tell when it was done; I was in that boat.

Cross-int. 36. (De bene, as above.) And by that reckoning it was three years ago last summer, was it?

Ans. Yes, sir.

Cross-int. 37. (De bene, as above.) Was it the summer of 1866 or 1867?

(Objected to.)

Ans. I don't know.

Cross-int. 38. (De bene, as above.) Is three years ago last summer the summer of 1866, or the summer of 1867?

Ans. It was 1866.

Cross-int. 39. (De bene, as above.) Where were you in the summer of 1866, and what were you doing that summer?

Ans. In the yacht "Ambrotype."

Cross-int. 40. (De bene, as above.) Were you ever in her more than one summer?

Ans. No, sir.

Cross-int. 41. (De bene, as above.) Were you in her July 2d, 1666?

Ans. Yes, sir.

Cross-int. 42. (De bene, as above.) Were you in her July 2d, 1867?

Ans. No, sir.

Cross-int. 43. (De bene, as above.) What were you in, July 2d, 1867?

Ans. The yacht "Princess."

Cross-int. 44. (De bene, as above.) What were you in, July 2d, 1868?

Ans. I was in the yacht "Princess."

Cross-int. 45. (De bene, as above.) What were you in, July 2d, 1869?

Ans. Last summer? (Counsel for respondent saying yes, witness continued,) You've got me bothered now; you've got a year ahead of me. (Question repeated.) In the "Princess;" I have said all along that I

124 was in the "Princess" two years, and in the "Ambrotype" one year. I didn't say anything about '66; you asked me about that; I don't know whether it was '66 or '56.

FRANK BIRD.

Deposition of Albert Boschke, taken July 16, 1869, before me, Chas. F. Walcott, notary public.

Direct examination by R. H. Dana, jr., esq., of counsel for libellants:

Int. 1. Please to state your name, age, and residence.

Ans. Albert Boschke; forty-four years of age; Boston.

Int. 2. What is your profession; how long have you been engaged in the pursuit of it, and where?

Ans. Civil engineer by education. I have been engaged in the pursuit of that profession about twenty years, in the United States, in the service of the United States Coast Survey.

Int. 3. State what opportunities you have had of studying and knowing Boston Harbor.

Ans. I have made a thorough survey of it, occupying six years, under direction of the U. S. commissioners on Boston Harbor; I have compared my surveys with former surveys, and studied the changes.

Int. 4. Please state what is the plan produced by you, and marked "Mr. Boschke's plan." (The plan here referred to has been identified by the magistrate.)

Ans. This chart is a tracing of the original manuscript chart obtained from my survey.

Int. 5. What do the several colors and figures denote?

Ans. The lines in blue enclose areas of eighteen feet and less, at low water, spring tides. That is to say, the blue line itself denotes eighteen feet of water, at low water, spring tides; the red line denotes twelve feet; the green line, six feet; the line of low water is represented by broken lines in black; at Bird Island flats, the figures denote soundings in feet at the same state of tide spoken of before.

125 Int. 6. What is represented by the oblong red figure marked "school-ship" and the two other figures of red?

Ans. The position and approximate size of school-ship at ebb tide; the two smaller figures in red, the position of the mooring buoys at ebb tide.

Int. 7. Did you take the position of the ship and the buoys yourself; if so, when?

Ans. I took the position myself, of the buoys; the ship wasn't there at the time; it was at the time of the trial of this case in the district court.

Int. 8. How did you obtain the position of the ship?

Ans. By placing the ship in the direction of the current at an early stage of ebb tide, allowing for usual length of cable.

Int. 9. Take the 7th of November, 1866, at one hour and a quarter ebb, how much is to be added to the lines and figures to get the depth of water?

Ans. About thirteen feet; the ordinary rule is to add to the soundings as given; for spring tides fourteen feet, and for neap tides ten feet, and for ordinary tides twelve feet, at high water; from numerous causes the actual tide may, in all cases, vary a foot either way.

Int. 10. Suppose the wind to have been westerly, and a good breeze on the 7th of November, 1866, does that change your answer of thirteen feet to the ninth question?

Ans. It would have the tendency to have less rise of tide, but how much I can't tell.

Int. 11. Please give the following distances: from the nearest part of the school-ship to the nearest points in the red line and the green line.

Ans. Three hundred and eighty feet from the school-ship to the red line, and five hundred and thirty-five feet to the green line; I mean about; I can't tell within a few feet. I have given these figures by measuring from the chart, as near as I can, with compasses and the scale.

Cross-examination by W'm G. Russell, esq., of counsel for respondents:

Cross-int. 1. The direction in which the school-ship swings would be affected by the direction and force of the wind, would it not?

126 Please state what direction and what degree of force you have allowed for the wind in laying down the position of the school-ship upon the chart produced.

Ans. Yes, sir; I have not allowed for the influence of the wind at all.

ALBERT BOSCHKE.

127 TESTIMONY FOR RESPONDENTS.

Deposition of William T. Browne, taken Dec. 28, 1866, before me, Winslow Warren, jr., U. S. Commissioner.

Direct examination by W. G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation; how long have you been at sea, in what vessels, in what capacities; how long in the service and in the ship to which you are now attached?

Ans. My name is William Thomas Browne; age is thirty-six; residence Liverpool, England. I am a master mariner. I have been at sea twenty years, in first-class ships, principally the Australian trade between Liverpool and Melbourne, as chief officer in the Australian trade. I served an apprenticeship, of course, out of Liverpool, between that place and Melbourne. I have been master about eighteen months in a steam service. I passed my examination as master, and got my certificate about seven years ago. I have been in the service of the steamship company six years; about twelve months as chief officer. Six voyages I have made in the "Java" as chief officer.

Int. 2. Were you on board the "Java" on the seventh day of November last, at the time of her collision with the schooner "James McCloskey;" and if so, in what capacity?

Ans. I was on board of her as chief officer.

Int. 3. Where were you stationed at, coming up the harbor at that time, and for what purpose, and who were there with you?

Ans. I was stationed on the forecastle, for the purpose of looking out; there were two sailors on the look-out, and the whole of my watch, some twenty men besides.

128 Int. 4. How high above the water is the forecastle where you were stationed?

Ans. About twenty-four feet.

Int. 5. Where are the two sailors who were stationed as look-outs by you?

Ans. They left the ship in Liverpool.

Int. 6. At what time of the day did the collision take place? What was the weather, the wind, and the tide at the time?

Ans. About twenty-five minutes past twelve, noon; the weather was fine, wind light, northwest; tide about two hours ebb.

Int. 7. State where you took on board the pilot, and where was he stationed on board said ship, and in whose charge was the ship from the time he came on board to the time of reaching her dock?

Ans. We took him on board, I should think, about twenty-five miles east of Boston Light; he was stationed on the bridge; the bridge is before the funnel—it goes across the ship—right across the saloon deck, from thirty to thirty-five feet above the water's edge; the ship was in charge of the pilot from the time he came on board until she reached her dock.

Int. 8. State at what speed you came up the harbor, and if any changes in rate of speed were made; state where and what changes were made before you discovered the schooner "James McCloskey."

Ans. At half speed from Fort Independence to the Slate Ledge Buoy, I think it was; from there slow; we went from half speed to slow before discovering the "James McCloskey."

Int. 9. State what vessel or vessels, if any, you observed before you saw the "James McCloskey," and state what you observed of them.

Ans. I saw the school-ship at anchor; it was the "Geo. M. Barnard," lying with her head to the northwest, as represented on the plan herewith produced at the point marked G. M. Jr.; (said plan is hereto annexed, marked Exhibit A, W. W., Jr.) I observed a number of small vessels, small and large, lying at anchor ahead of the school-ship; also a schooner under canvas coming to the eastward inside of the school-ship, which I reported to the pilot on the bridge; they had seen the schooner off the bridge before I did; she was under canvas; starboarded her helm, and went clear of us to the eastward about a quarter of a mile; not a quarter of a mile, a good distance off; she was on our starboard side.

129 Int. 10. Where was the "Java," with regard to the school-ship, when you first observed the schooner with canvas?

Ans. We were proceeding to our dock, about four or five ship lengths off from the school-ship, and astern of her; that is, we had not come up with her; she was on our starboard bow a little.

Int. 11. State whether any change of speed was made on the "Java" at discovering said schooner under canvas.

Ans. I believe we were stopped.

Int. 12. State what you mean by stopped.

Ans. I mean that our engines were stopped altogether.

Int. 13. State what occurred after you thus observed the schooner under canvas to the time of the collision, and all the circumstances of the collision, and where and how it occurred.

Ans. After the schooner under canvas was clear of us, I saw the schooner "James McCloskey" come from under the stern of the school-ship. She was drifting down with the tide, had her foresail partly hoisted, but no other sail set. I was afraid that we should come into collision, and sung out for them on the schooner to starboard their helm. The pilot and Captain Moody had seen the schooner off the bridge also, and I believe had ordered them to reverse the engines full speed. There did not seem to be any headway on our ship when we came into collision. We struck the schooner abaft the main rigging on her starboard side, with our cutwater, our stem; immediately after the collision, the "Java's" engines being reversed, she went astern clear of her, and the schooner was towed into dock by a tug-boat. It occurred about five hundred feet from the stern of the school-ship.

Int. 14. State whether your bows had or had not passed by the stern of the school-ship when you first discovered the "James McCloskey."

Ans. I don't think they had passed by the stern of the school-ship, but were on a line with her stern. I was not so particular as to measure distances.

Int. 15. Why had you not seen the "James McCloskey" before you did see her?

Ans. Because she was coming down in a line with the school-ship; the school-ship was shutting her out from us.

130 Int. 16. Had you, or not, been on the lookout for any vessels lying in your course inside the school-ship to the dock?

Ans. Yes.

Int. 17. Were you expecting to take the course inside the school-ship?

Ans. Yes; we always take inside the school-ship on the ebb tides.

Int. 18. How long had you been so looking out and expecting to go inside the school-ship?

Ans. I expected to go inside the school-ship from the time we passed Slate Ledge Buoy, seeing a number of vessels ahead of the school-ship and on her port bow; I had been looking out on the forecastle from the time the pilot came aboard.

Int. 19. How constantly were you on the lookout for the last half mile of your course, before the collision?

Ans. I was on the lookout constantly. I am put on the forecastle for that purpose.

Int. 20. If the "McCloskey" had been in sight from the "Java," for the last half mile of your course before reaching the school-ship, would you, or not, have seen her?

Ans. If she had been in sight I certainly should have seen her.

Int. 21. Why can you answer with certainty?

Ans. Because I was on the forecastle for the purpose of keeping a lookout, and I saw the other schooner under canvas, and if the "James McCloskey" had had her canvas set I should have seen her.

Int. 22. How would you have seen her if she had had her canvas set?

Ans. We should have seen her canvas; we could not distinguish her spars, it being on a line with the school-ship's rigging, until she got clear.

Int. 23. State whether the "McCloskey" was, or was not, under steerage-way when you discovered her.

Ans. She was not under steerage-way.

Int. 24. State whether or not, if the "McCloskey" had been under steerage-way, or under canvas, when you discovered her, she could have avoided the collision.

Ans. Yes, sir, easily.

Int. 25. How?

131 Ans. By starboarding her helm, she would have gone as far off as the other schooner, gone clear as the other schooner.

Int. 26. State whether anything besides reversing the engine was done on board the "Java" at discovering the "McCloskey."

Ans. I believe our helm was put to starboard, but only from information from the wheel-house slate, which I examined for the purpose of making up my log-book.

Int. 27. At what rate of speed was the "Java" moving after you stopped for the schooner under canvas, and when you first saw the "McCloskey," and at what rate at the moment of collision?

Ans. When she was stopped for the schooner under canvas she would be going from three and a half to four miles per hour; when we first saw the "McCloskey" she was going about two miles per hour; at the moment of collision I imagine she was going astern. I believe the schooner had more way than we had.

Int. 28. What were the men on board the "McCloskey" doing when you first saw them, and what did they do when you hailed them to starboard her helm?

Ans. They were about hoisting their foresail up. One man was at the helm, who left it and went forward when we hailed them. Not more than ten feet of the throat of the foresail was up.

Int. 29. Had you, while on the lookout, anything to do with giving orders on board the "Java," as to her course, or the working of her engines?

Ans. No, sir.

Int. 30. Examine the plan produced, and marked "Exhibit A, W. W. Jr.," and state whether the lines drawn on the same were drawn by your directions, and, if so, what they represent, or were intended to represent.

Ans. They were drawn under my direction. "G. M. B." is to represent the school-ship; "J. M." is the schooner "McCloskey;" the line is about the course we came up the harbor; point 1 is where we went slow; point 2 is where we saw the schooner under canvas and stopped.

Cross-examination by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. When were the lines drawn on the exhibit?

Ans. This morning.

132 Cross-int. 2. Where was that done?

Ans. In Mr. Russell's office.

Cross-int. 3. Who were present at the time?

Ans. Mr. Herriot, Mr. Martin, the pilot, Robert Slading, John Evans, and myself, and Mr. Russell.

Cross-int. 4. Who are Messrs. Herriot, Slading, and Evans?

Ans. Mr. Herriot is second engineer. Slading and Evans are quartermasters, at the wheel at the time of collision.

Cross-int. 5. By whose hand were the lines drawn?

Ans. By Mr. Russell's.

Cross-int. 6. Did the pilot see the lines drawn?

Ans. Whether he was looking on or not, I am not sure; he was in the room.

Cross-int. 7. Did he see them after they were drawn?

Ans. Yes, sir; I asked him whether that was not about the position of the vessels.

Cross-int. 8. What did he reply?

Ans. He said it was about right.

Cross-int. 9. Is he now present?

Ans. Yes.

Cross-int. 10. Has he been present during all your examination so far?

Ans. Yes.

Cross-int. 11. Have Herriot, and Evans, and Slading, been present?

Ans. Not Evans, I have sent him away; the others have.

Cross-int. 12. Does "J. M." represent the position of the schooner "McCloskey" at the instant of collision?

Ans. Yes, as near as possible.

Cross-int. 13. Please mark on the line, with the figure 3, the spot where you were when you first saw the "McCloskey."

Ans. I have done so.

Cross-int. 14. Do you know the situation of the Grand Junction wharves?

Ans. No, sir.

Cross-int. 15. Please explain how, according to the plan and lines, the "G. M. Barnard" could have cut off your view of the "James McCloskey."

133 Ans. I should say that is not exactly the position; it was drawn roughly; the "J. M." is, at the time of collision. When first seen she was under the school-ship's bow; the school-ship would obstruct her; she was drifting down to the eastward; she was not seen.

Cross-int. 16. Where do you imagine the "McCloskey" was coming from?

Ans. I didn't imagine anything about it, but should think she was coming from the northward and westward; she might have come from the Charlestown dock. I hear she was coming from the East Boston wharves, but I don't know it.

Cross-int. 17. Should you think it possible she could have been coming in a direct line from near your own dock?

Ans. No, sir; unless she was towed out.

Cross-int. 18. Could you see your dock when you first saw the schooner under canvas?

Ans. No, sir.

Cross-int. 19. What was in the way?

Ans. The school-ship; they might have seen the dock from the bridge.

Cross-int. 20. You mean by seeing over the school-ship, do you not?

Ans. Yes, sir.

Cross-int. 21. If the officers on the bridge could see your dock over the deck of the school-ship, why could they not also have seen the "McCloskey" over the school-ship, before she came out clear of the school-ship's stern?

Ans. I only suppose they could see the dock off the bridge, and even in that case it would be very easy to see the dock and not the schooner. The rigging of the school-ship would shut the schooner off on account of her position, having only her spars.

Cross-int. 22. Is it your opinion that if the "McCloskey" had had her sails fully up, she could have been seen by the officers on your bridge, over the deck of the school-ship and through the spars and rigging of the school-ship?

Ans. Yes, we saw the other schooner.

Cross-int. 36. Please take the plan shown you, which is a duplicate of Exhibit "A," and mark on it the course of your vessel from the

134 Slate Ledge buoy No. 11, to the place of collision. Mark also the position of the school-ship.

Ans. The line marked on the plan (said plan is hereto annexed, marked "B, W. W. Jr.,") is the course of the vessel as near as I can mark it. Either of the two groups of vessels will answer for the position of the schooner and school-ship at the time of collision. The plan is altogether too small to mark correctly upon, but I do not think it would vary many hundred yards from that.

Cross-int. 24. Why do you decline, at my request, to select one of the two groups as the proper representation of the place of the school-ship and schooner?

Ans. Because as it is asked for the purpose of ascertaining whether the two marks and courses made by me would be alike, I cannot say exactly, but I think that would be about the proper course I have indicated there.

Cross-int. 25. Please mark "1" where you went slow, "2" where you

stopped when you saw the schooner under canvas, and "3" where you first saw the "McCloskey."

Ans. I have marked them so, but the points "2" and "3" will vary if the farther position of the ships be taken as the true one, likewise the position of the ships will have to be altered, for they were not laying that way.

Cross-int. 26. What change do you wish to make in the heading of the school-ship? How many points, and to port or starboard?

Ans. If these points were made correctly, the school-ship should lay heading northwest, laying northwest and southeast, I mean a magnetic northwest and southeast. The schooner was coming exactly in a line with the school-ship. In the southerly group the school-ship is about right, but the schooner should be on the same line as the school-ship, that is, heading southeast. In the northerly group both want to come about half a point to port.

Cross-int. 27. When you saw the "McCloskey" how did you report her to the pilot—in what words?

Ans. I didn't report the "McCloskey" at all; I sung out "hard astarboard;" we were too close to her for reporting; two or three hundred people, all our passengers could see her,—all could see a collision was inevitable between us and the school-ship, or with the schooner.

135 Cross-int. 28. Was there room for your ship to go between the school-ship and the "McCloskey?"

Ans. Not in the line the "McCloskey" was coming—coming in the way we first saw her—or, no, would be the quickest answer to that.

Cross-int. 29. Why then did you order the helm astarboard?

Ans. If the schooner had starboarded her helm, she would have gone out of the way, if we had starboarded our helm; I didn't order our helm to be starboarded; I sung out for the schooner to starboard her helm. I had nothing to do with our helm.

Cross-int. 30. Please, then, explain your answer to the twenty-seventh cross-interrogatory.

Ans. I sung out "hard astarboard."

Cross-int. 31. Do you mean that your words "hard astarboard" were addressed to the "McCloskey," and not to your own ship?

Ans. To the "McCloskey."

Crost-int. 32. When you saw the "McCloskey," did you do nothing, and say nothing to, or relating to your own vessel, or any of her officers?

Ans. No, sir.

Cross-int. 33. If your helm was put to starboard, did it not endanger running into the school-ship?

Ans. Yes, sir.

Cross-int. 34. When did you leave and when return to the service of this company?

Ans. I left in December, 1863, and returned in August or September, 1865.

Cross-int. 35. In what service were you engaged in this interval?

Ans. In the Otargo Steamship Co.; running the mail between Melbourne and New Zealand. I was commanding the "Albion."

Cross-int. 36. Was that the only service you were engaged in, in the interval?

Ans. I was in the Gippsland Steamship Co., exploring the lakes in Gippsland, in Australia. I had charge of a steamer there. That's all.

Cross-int. 37. In answer to the tenth direct interrogatory, do you mean to speak of your own ship's length; if so, what was that?

Ans. Our own ship's length, three hundred and sixty feet.

136 Cross-int. 38. Do you change your course for the schooner under canvas; if so, how?

Ans. I do not know, sir, anything about it; that is, about the course I mean.

Cross-int. 39. How did you report the first schooner to the pilot?

Ans. By asking him, did they see the schooner; they replied "yes."

Cross-int. 40. How do you know that you reversed your engines before you hit the "McCloskey."?"

Ans. By the speed with which we went astern, immediately we touched her, or after the collision.

Cross-int. 41. If you were going from three and one-half to four knots when you stopped your engines, as you say, at what rate were you going when you were slowed down?

Ans. Four knots.

Cross-int. 42. Do you think you changed your head at all to port, after you saw the "McCloskey?"

Ans. I could not say.

Cross-int. 43. Do you think you changed your head at all to the starboard, after you saw the "McCloskey?"

Ans. I could not say.

Cross-int. 44. Was there time, after you saw the "McCloskey," and before the collision, for the person in charge to order a change of helm to be made, and the vessel to be so affected by it as to change her course?

Ans. I should think there was.

Cross-int. 45. Was there time for a change of two points?

Ans. I couldn't say.

Cross-int. 46. Is it not just as likely as not that there would have been no change effected, if the helm was changed in that short interval?

Ans. Very likely the ship's head wouldn't have been affected.

Direct examination resumed:

Int. 31. By your answer to the twenty-eighth cross-interrogatory, do you mean to say that there was not space for your ship to lie between the school-ship and the schooner, or that there was not room enough to turn your ship into that space?

(Objected to as leading.)

137 Ans. I mean that we had not room to starboard our helm, and get out of her way, for the school-ship.

Int. 32. Was there, or not, space enough between the schooner and school-ship for your ship to lie in if she could have turned in there?

Ans. I don't understand that question now. (The question being read, the witness says:) There was room enough to lie there.

W. T. BROWNE.

(At the examination of W. T. Browne, Wm. G. Russell, esq., gives notice that he here produces the log-book for Mr. Dana's inspection, to be put into the case if he shall desire it.)

Deposition of George Herriot, taken December 28, 1866, before me, Winslow Warren, jr., U. S. Commissioner.

Direct examination by Wm. G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation; what has been your experience in your business; how long have you been in

the service you now are in, and how long in the "Java," and in what capacity?

Ans. My name is George Herriot; age, thirty-one and a half; residence, Liverpool, England, and occupation, engineering. I have been working in that trade for sixteen years. I have been ten years in the service I am now in—the Cunard Steamship Line. I have been in the "Java" ever since she was built, ten voyages, as second engineer.

Int. 2. How many engineers have you on board the "Java?"

Ans. Six, and a boiler-maker, who takes a watch with the engineer and counts as an engineer at sea.

Int. 3. Were you on board the "Java" at the time of her collision with the "James McCloskey" on the 7th of November last? Where were you at the time of collision? What were you doing? Where was the chief engineer? How did you know of the collision?

138 Ans. I was then on board of her. I was standing by the engines at the time of collision, ready to work the engines if called upon. I had the entire charge of the engines at that time. I do not recollect where the chief engineer was. I didn't know of it until I heard of it afterwards—after the ship was docked.

Int. 4. At what rate of speed were your engines moving as you came up the lower part of the harbor, before the collision?

Ans. About twenty-seven revolutions per minute.

Int. 5. What speed do you call that; full speed, or otherwise?

Ans. I call it half speed.

Int. 6. State whether at any time as you came up at half speed, any change of speed was made before the collision; and if so, what?

Ans. We made a change to slow.

Int. 7. By what order, and how was it received?

Ans. On the bridge there is a dial marked ahead, astern, easy, easy ahead, easy astern, half speed ahead, half speed astern, full speed ahead, full speed astern, stop, stand by; in the engine-room there is a similar dial. The one on the bridge communicates with the one in the engine-room. Whatever the order the captain wants to communicate, he shifts his above and it shows the same below; the shifting of the indicator also strikes a bell to draw attention to the dial. The order was given "slow" from deck by this indicator. I don't know whether the order on the indicator is "easy," or "slow;" but I think "slow."

Int. 8. While running "slow" in pursuance of that order, did you receive any other order; and if so, what was it?

Ans. "Stop."

Int. 9. Did you execute that order?

Ans. I did.

Int. 10. Did you after executing the order "stop," receive any other order; and if so, what was it?

Ans. I received orders to turn back, full speed.

Int. 11. Did you execute that order, and how?

Ans. I did, by turning back instantly.

Int. 12. State what time was required to execute that order, and to turn back full speed.

Ans. I should say from three to four seconds.

139 Int. 13. State whether there was any delay in executing it in this instance.

Ans. None whatever.

Int. 14. State whether the "Java's" engines are well or ill adapted to executing that order instantly, and how they are so adapted.

Ans. They are well adapted, having a steam cylinder for shifting the link; the link being the common link motion, and it being only neces-

sary to shift the link from one side to the other, to turn back or turn ahead; the steam cylinder acts upon a four-threaded screw to facilitate the motion, and is four times as quick as a single-thread screw.

Int 15. How do her engines in this respect compare with those in general use in steamships?

Ans. I consider you can turn them back quicker than any other sort.

Int. 16. What was the effect of your executing the order to turn back full speed?

Ans. the engines reversing instantly; that moves the propeller with reverse motion; we turn back at a speed of about forty-five revolutions a minute.

Int. 17. State as nearly as you can how many revolutions back your engines made when you executed the order.

Ans. I couldn't do that; I don't recollect how many minutes we turned back.

Int. 18. Did you or not after this proceed to your dock at East Boston? And if with any delay, say how much delay?

Ans. We proceeded to our dock; I couldn't say how much delay; I only had to execute the orders from the deck.

Int. 19. At what rate of speed per hour was the "Java" moving when she was moving at the order, "slow" or "easy?"

Ans. Say from three to four knots per hour.

Int. 20. At what rate was she moving after you had executed the order to back at full speed?

Ans. She might have been going back at the rate of six knots, I would say; I mean after the way had been taken off the ship; you must back a little while to take the way off of a ship when a ship is going, before you can take the way off of her.

Int. 21. At the rate the ship was going after you had stopped
140 her engines, how many revolutions backwards would it take to take off her headway?

Ans. I will say twenty revolutions.

Cross-examination by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. Will the "Java" back directly astern by backing her engines?

Ans. She will.

Cross-int. 2. Do you mean if her helm is kept amidships?

Ans. She will back easier with her helm amidships, the ship standing still.

Cross-int. 3. If her helm is amidships, will she go in a straight line astern in still water, and no current or wind?

Ans. She ought to do so. I can't answer that question, because we have nothing to do with the ship on deck; our duty is below.

Cross-int. 4. If you are going full speed ahead, and smooth sea, and order is given to stop, how long before the ship comes to a dead stop?

Ans. I can't tell how long it will be before the ship comes to a dead stop. I can tell how long it will be before the engines come to a dead stop.

Cross-int. 5. How long before the engines come to a dead stop?

Ans. About two seconds.

Cross-int. 6. Is not more time taken to make the first twenty revolutions back, when you change from forward, than is required for twenty revolutions back after you have been backing for several minutes, and have full sternway on her?

Ans. There is.

GEORGE HERRIOT.

Deposition of Robert Slading, taken Dec. 29, 1866, before me, Winslow Warren, jr., Commissioner.

Direct examination by Wm. G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation; how long have you been at sea; in what capacity?

141 Ans. My name is Robert Slading; age, twenty-eight; residence, Rockferry, Cheshire; I am a mariner; I have been at sea twelve years as seaman, until I went quartermaster on the "Java."

Int. 2. How long have you been in the service of the Cunard line of steamers; how long in the "Java;" in what capacity; were you on board of the "Java" on the 7th of November last, at the time of her collision with the "James McCloskey?"

Ans. Seven years; six voyages in the "Java" as quartermaster. I was then on board of her.

Int. 3. State how many quartermasters the "Java" carries; how many are usually at the wheel, and how many are at the wheel at entering port?

Ans. She carries six; one is usually at the wheel at sea, and three on entering port, and a sailor also.

Int. 4. State where you were stationed at the time of the collision, and what was your duty there, and who were with you?

Ans. I was at the wheel; my duty there was to steer the ship into port; two more quartermasters and a sailor were there with me; at that time I was in charge.

Int. 5. State whether or not whilst at the wheel you can tell the rate of speed at which the steamship is moving—whether at full speed, half speed, or slow, or whether her engines are stopped or in motion?

Ans. Yes, sir; I can particularly well at the wheel; we can tell every change by the wheel by the motion of the engine, either faster, or slower, or stopped, by the jiggling of the wheel.

Int. 6. State how you can tell when the engines are stopped?

Ans. There is no motion upon the wheel whatsoever.

Int. 7. Is the motion upon the wheel perceptible when the engine is going slow?

Ans. Yes, sir.

Int. 8. State as you came up the harbor at what rate of speed the "Java" went; and if any change was made in that rate, say what change?

Ans. We was coming up the harbor at half speed; the next change was, slow; the next was, stopped.

Int. 9. Whilst going slow, at about what rate of speed was the "Java" moving?

142 Ans. She was moving at about from three to four miles per hour.

Int. 10. State, if you know, for what purpose the change was made from "slow" to "stop."

Ans. The change was made by the schooner with canvas coming down.

Int. 11. How long did the steamer go with her engines stopped, and at what rate did she move?

Ans. She did go two or three minutes; she moved about a mile and a half per hour.

Int. 12. Whilst going with her engines stopped, state whether you received any order as to the helm, and if so, what?

Ans. Hard astarboard, sir.

Int. 13. State by what mode the order was given to you?

Ans. Well, I didn't know at the time what the words "hard astarboard" were for. It was given from the bridge by telegraph by the pilot. I got it also by sign by the hand from the pilot, and by word of mouth also from four different officers. There is a quartermaster stands above the bridge, another one at the crank hatch, the fourth officer at the conn, the second officer before the wheel-house; they passed the word both by sign and by word of mouth from the bridge. I can see the pilot perfectly well, but am not required to hear him; it is too far; he passes the word and it comes along directly; we received the order first by telegraph. It's more like the face of a clock than anything else, and is placed right before me—right in the centre of the wheel-house, so we have no difficulty in turning. In the first place it rings a bell, and at the same time there is a black shutter on the dial plate lifts up and shows the reading underneath, marked on it, "steady," "port," "hard a port," "starboard," "hard astarboard," and that's all—a different shutter for each order. It is generally worked by the captain from the bridge; he has the same dial on the bridge as in the wheel-house. From about a half a second from the time he touches the handle, it's in the wheel-house—momently; then we have to return the answer to him.

Int. 14. State whether this order of hard a-starboard was executed; and if so, by whom, and how quickly?

Ans. It was executed by me the moment we received the order in the wheel-house, two more quartermasters and a seaman.

143 Int. 15. How long did it take to get the helm hard astarboard?

Ans. From six to eight seconds.

Int. 16. State whether you noticed at the time or afterwards what was the cause of that order, and if so, state what you noticed?

Ans. I did not know at the time what the order was for, nor until I saw the schooner cross our bows; then I knew what it was for.

Int. 17. How soon did you see the schooner across your bows?

Ans. From the order we got hard astarboard, our helm was hard astarboard, and then I looked and saw the schooner across our bows; it couldn't have been more than a minute or so.

Int. 18. How far from your bow was she when you first saw her?

Ans. She was right across the bow.

Int. 19. State what schooner this was.

Ans. This was the schooner we hit, the "McCloskey."

Int. 20. State whether or not, at or about the time you got the order hard astarboard" any change was made in the engines of the "Java."

Ans. Reversed back, sir; full speed.

Int. 21. At what time was this done?

Ans. I couldn't state the exact time.

Int. 22. At what time was it with reference to the time you received your order "hard astarboard;" before, after, or at the same time?

Ans. About two seconds afterwards, as near as possible.

Int. 23. Did you see the school-ship "Geo. M. Barnard," at the time of the collision? If so, where were you, with regard to the said ship, when you got your order hard astarboard?

Ans. Yes, sir, I saw the stern of the school-ship; we were more astern of her, more in an angle, when I got the order.

Cross-interrogatories by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. Where were you, when you saw the schooner under canvas; were you past the Slate Ledge Buoy?

Ans. That I can't answer, because I am out of sight.

Cross-int. 2. How far do you think you were from the school-ship when you saw the schooner under full canvas?

Ans. It would be about two hundred feet, I should think.

Cross-int. 3. When you saw the first schooner, did the school-ship bear ahead, or on your port bow, or your starboard bow?

144 Ans. Our head was of course pointing to the eastward; as to laying exactly, I didn't pay that much attention to it, because my attention was attracted to something else.

Cross-int. 4. Can you not tell on which bow the school-ship bore then?

Ans. It must have been on the port bow.

Cross-int. 5. Was any change made in the helm for the first schooner?

Ans. No, sir; only stopped the engines.

Cross-int. 6. Did the first schooner cross your bow, or only go alongside?

Ans. The first schooner passed our bow, but starboarded her helm and shot clear of us.

Cross-int. 7. Did she come from the westward or eastward of the school-ship?

Ans. She came down from the upper wharves, down from the river, from where I couldn't say.

Cross-int. 8. From the westward or eastward of the school-ship?

Ans. I don't know exactly how the harbor bears.

Cross-int. 9. From between the school-ship and the East Boston wharves, or from between the school-ship and the city wharves?

Ans. Between the school-ship and the East Boston wharves.

Cross-int. 10. Before you noticed a change in the engines on account of the first schooner, had you received an order for any change in the helm?

Ans. Not for the first schooner; we had no change at the helm for the first schooner.

Cross-int. 11. I do not refer to a change in the helm on account of the first schooner. But before the first schooner was seen or anything was done about her, had you received an order affecting your course?

Ans. No, sir.

Cross-int. 12. When did you begin to port your helm, so as to go inside the school-ship?

Ans. That I couldn't say; not when.

Cross-int. 13. How long before you saw the first schooner was it that you began to port your helm so as to go inside the school-ship?

Ans. I think we were going in a direct line to go underneath
145 the school-ship's stern, when the schooner dropped out betwixt the ship and the East Boston wharves close alongside of the ship.

Cross-int. 14. Which schooner do you now refer to as so dropping out?

Ans. The "McCloskey," sir.

Cross-int. 15. How long had you been going on that straight line to pass under the stern of the school-ship before you saw the schooner "McCloskey?"

Ans. Not so very far, sir; couldn't been going very far, not straight, sir.

Cross-int. 16. Make the best estimate you can.

Ans. I couldn't pretend to say, as there is so much starboarding and porting coming into port.

Cross-int. 17. You must, at some time or other before seeing the schooner "McCloskey," have put your helm to port, so as to take you across the stern of the school-ship, must you not?

Ans. I think we were heading in that direction when the first schooner came by.

Cross-int. 18. If that is so, how long before she came by had you been so heading?

Ans. That I couldn't answer, sir.

Cross-int. 19. What objection have you to stating, as near as you can, how long before you saw her you ported your helm?

Ans. I don't think there was any porting about it. I don't think there was any porting at all.

Cross-int. 20. How could you go in the direction you state, without having ported your helm at some time?

Ans. Of course we ported the helm coming up the harbor to get in that line, but I could not say how far or how long.

Cross-int. 21. That is exactly what I ask; with no reference to avoiding the schooner, state, as near as you can, how long before seeing the first vessel you had ported your helm to get into that line.

Ans. I can't offer to state no idea, not knowing how the buoys lay, nor nothing; I can form no idea at all.

Cross-int. 22. If you had not ported your helm, you would have gone to the westward of the school-ship; cannot you tell somewhere
146 near when you received an order to port your helm so as to get into the line to take you to the eastward of her?

Ans. I couldn't, not knowing anything about the harbor or buoys; I didn't pay that much attention.

Cross-int. 23. How soon after the first schooner passed you, did you see the "McCloskey?"

Ans. About two minutes, sir.

Cross-int. 24. Did you see the first schooner before she came out clear of the school-ship?

Ans. No, sir.

Cross-int. 25. After the engines began to stop for the first schooner, and she had passed clear of you, did they begin to go ahead again?

Ans. No, sir.

Cross-int. 26. What was the next change in the engines?

Ans. To turn back, full spead—by the motion of the wheel.

Cross-int. 27. How long between the apparent stopping of the engines and the apparent back at full speed?

Ans. Three or four seconds. I didn't understand the question. By the time of stopping we run two or three minutes ahead; the ship was going ahead with the engines stopped, moving, for the first schooner, and then it was turned back full speed.

Cross-int. 28. I do not inquire about the motion of the ship, but about the movement of the engines; how long was it from the time the engines began to stop and the time they began to reverse?

Ans. It couldn't be many seconds, sir.

Cross-int. 29. Do you think the ship had got to a stand-still when the engines began to reverse?

Ans. No, sir.

Cross-int. 30. At what rate was the ship going when the engines began to reverse?

Ans. Going about a mile or a mile and a half an hour.

Cross-int. 31. Did the ship get sternway on her, so as to require you to reverse your helm before you struck the "McCloskey?"

Ans. No; the helm was just getting put hard astarboard when the engines were reversed; of course the helm was hard astarboard.

Cross-int. 32. Did the ship get sternway on her before you struck the "McCloskey?"

Ans. That I couldn't say; I couldn't answer that question, not being able to see.

Cross-int. 33. Cannot you tell when steering, whether your ship has sternway on her, or headway?

Ans. Yes, sir.

Cross-int. 34. Then please tell whether your ship had sternway or headway on her when you saw the "McCloskey" right across your bow.

Ans. The engines were going astern, but it had fetched the helm to a stand-still when she struck, for a moment; and as soon as the ship began to draw astern, it drew the helm harder over still; the pressure, the drawing back, would of course crowd the helm farther over still.

Cross-int. 35. When you put your helm hard a-starboard, did the ship obey the helm?

Ans. A very, very little; being that there was very little way on the ship.

Cross-int. 36. Are you sure she had not sternway before she struck the "McCloskey?"

Ans. No, sir; I don't think there was sternway on her.

Cross-int. 37. Did you port your helm when she began to back away from the schooner?

Ans. Couldn't move the helm, sir, with the ship going astern.

Cross-int. 38. Does not that turn her head round to starboard?

Ans. No, sir; that throws her head in an opposite direction, to port.

Cross-int. 39. How is the head thrown if she has headway, and the helm is starboarded?

Ans. Fetches her head to port.

Cross-int. 40. Is there no change if she has sternway?

Ans. Of course it fetched her head to port, to left hand. (Upon the question being repeated, the witness says:) If her helm is hard astarboard, and the vessel has sternway on, it fetches her round to starboard.

Cross-int. 41. Was this your course; you were going on a line so as to pass under the stern of the school-ship, and the school-ship bore on your port bow? If not, please correct.

Ans. Yes, that was about our course; going under the school-ship's stern.

148 Direct examination resumed by Wm. G. Russell, esq., of counsel for respondents.

Int. 24. In coming up the harbor do you steer any course by compass, or do you steer by orders given from time to time from the bridge?

Ans. Steer by the orders entirely.

Int. 25. Did you feel the shock, when the steamship struck the "McCloskey?"

Ans. No, sir.

Int. 26. Could you tell at the time exactly when she did strike?

Ans. No, sir.

Int. 27. How long did the engines remain stopped for the first schooner?

Ans. One or two minutes—two minutes.

Int. 28. Read again the twenty-eighth cross-interrogatory and your answer, and state your meaning.

Ans. After she was stopped of course she run slow a very, very short

time before she changed to back, for we were only just finishing getting the helm over when she turned back.

Int. 29. How long had she been running with the engines stopped before the order was given to reverse?

Ans. She had been running about two minutes, I should think—one or two minutes.

Int. 30. Read the second cross-interrogatory and your answer, and state again how far off from the school-ship you think you were when you first saw the schooner under full canvas.

(Objected to, for form.)

Ans. I couldn't rightly say the distance, but I should think it would have been something in that line—it might have been more.

ROBERT SLAIDING.

149 *Deposition of Edwin Ramsay Moodie, taken January* 1, 1867, *before me, Winslow Warren, jr., U. S. commissioner.*

Direct examination by Wm. G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation? How long have you been at sea, and in what capacities; how long as master; how long in the line of steamers to which the "Java" belongs; and how long in the "Java?"

Ans. My name is Edwin Ramsay Moodie, age forty-two, residence England, and occupation master mariner. I have been at sea twenty-six years, as a boy, mariner, mate, and master. For nineteen years as master, fourteen years in the Cunard line, one year in the "Java."

Int. 2. State the size of the "Java," the number of her masts, her height out of water, the position and height of the bridge.

Ans. She is 2,700 tons; she has three masts; the main deck is ten feet out of water, saloon deck about nineteen; the bridge, I should say about thirty-two feet—the bridge is just forward of the midships; the funnel is about twenty feet above the bridge—the bridge is forward of the funnel.

Int. 3. Were you on board and in command of the "Java" on the seventh of November last, at the time of her collision with the "James McCloskey;" on what voyage was she; who was in charge of the navigation of the ship and her course at the time of the collision; where were you stationed, and for what purpose; who was with you?

Ans. Yes, I was; she was from Liverpool to Boston. Mr. Martin, the pilot, was in charge of her navigation and course. I was on the bridge with the pilot, to see the orders of the pilot executed, and to keep a lookout, and to see to the telegraph and the working of the engines, to see that the vessel was safely got to her dock.

Int. 4. Where did you take on board the pilot on that day, and was he or not the first pilot offering his services to pilot your ship into the port of Boston?

Ans. About twenty-five miles from Boston light. He was the first pilot that offered his services.

150 Int. 5. State how the "Java" was manned and equipped, and whether or not a lookout was stationed at her entering port, and if so, what lookout, and where; and whether any, and if so what, other arrangements were made for her safe navigation into port to her dock.

Ans. She was fully manned and equipped in every respect for the voyage. The chief officer and two men were stationed on the forecastle, specially as a lookout, the rest of his watch were all on the forecastle ready for any service that might be required of them. There was an

officer placed between the chief officer and myself to pass the word along, also an officer placed between myself and the officer in charge of the steering, and three quartermasters in the wheel-house, and one seaman.

Int. 6. State what was the tide and what the direction of the wind as you came up the harbor, and how much wind.

Ans. It was hardly ebb, first quarter ebb, wind northwest, moderate breeze.

Int. 7. State whether you observed the school-ship "Geo. M. Barnard" as you came up the harbor; if so, how was she lying, and where, and how was your course directed as regards said ship?

Ans. Yes, I saw her; she was lying at her usual moorings, head up the stream, the river; our course was directed to go astern of her, go inside of her to get to our dock; she was lying in our course to our dock; we were about abreast the Slate Ledge Buoy when the pilot made up his mind to go inside of her as there were several vessels to the westward of her.

Int. 8. How large a ship is the "Geo. M. Barnard;" and was she at the time low in the water, or high out of water?

Ans. I should think between eight and nine hundred tons; she is high out of water, being light.

Int. 9. State at what speed you came up the harbor from the Lower Middle; and if any change in speed was made, state where, and what change.

Ans. I came up half speed after we passed the Lower Middle; from the Slate Ledge Buoy we slowed down to three or four knots.

Int. 10. After you ran slow, state whether any change was made in her speed; and if so, what change, and for what purpose, and where was the "Java," at the time?

151 Ans. We stopped about four or five lengths of the ship from the school-ship, to allow a schooner under full sail to pass us; she passed us inside, on our starboard side.

Int. 11. State what you mean by "stopped."

Ans. The engines entirely stopped.

Int. 12. State whether the engines started ahead again, before the collision.

Ans. No.

Int. 13. How long did you run with the engines stopped?

Ans. Until we saw the "James McCloskey," I should think until we were very close to the school-ship's stern; we ran so about four or five lengths; several minutes.

Int. 14. Where were you when you first discovered the "James McCloskey;" and where was she, and at what distance from you?

Ans. I was on the bridge; the "Java" was close to the school-ship's stern; the "McCloskey" was about abreast of the school-ship's bow; I should say four or five hundred feet from the "Java."

Int. 15. State what you observed of said schooner; in what position were her sails; was she or not under steerage way or command?

Ans. Her foresail was partly set; she had no other sail set; appeared to be just drifting with the tide; not under proper command.

Int. 16. State what orders were given, and what was done on board the "Java," at discovering said schooner.

Ans. The engines were reversed full speed, and our helm put hard astarboard.

Int. 17. By whose order was this done; and how and by whom were the orders communicated?

Ans. By the pilot's orders; they were communicated by myself to the officers abaft me; the orders to the engine-room by telegraph; to the helm by hand signal, and by passing the word, and I gave it by telegraph also.

Int. 18. State whether these orders were executed; and if yea, how quickly.

Ans. The engines were reversed in two or three seconds, and the helm put to starboard immediately.

Int. 19. At what speed was the "Java" running when you first discovered the "McCloskey," and at what speed when you struck her?

152 Ans. She was going about a knot or a knot and a half an hour when we first saw her—just perceptibly going ahead, and that was all, when we struck her.

Int. 20. Were, or were not, the engines reversed before you struck her?

Ans. Yes, they were.

Int. 21. How long had the engines been reversed before the blow?

Ans. The engines were going full speed back in fourteen or fifteen seconds after the order was given, and before the blow.

Int. 22. By whom was the "James McCloskey" first seen; the lookout forward, or the officers on the bridge?

Ans. The pilot and myself, I think, saw the vessel first; but almost immediately afterwards the chief officer called out.

Int. 23. State what was done by the first officer when he discovered the "McCloskey."

Ans. He called to the vessel to starboard their helm.

Int. 24. State whether the first officer gave any order to those on board the "Java," as to the helm or otherwise.

Ans. No.

Int. 25. Why did you not discover the "McCloskey" earlier than you did?

Ans. She was in the range of the school-ship, and having very little sail set, couldn't be seen by us.

Int. 26. If she had been out of range of the school-ship as you came up from the Slate Ledge Buoy, would you, or not, have seen her?

Ans. Yes.

Int. 27. State why you can say that you would have seen her, if not in range of the school-ship.

Ans. It was quite clear; we had, besides the pilot and myself, the lookouts I have already named. I was in a position to have seen anything that was not hid from our view by the school-ship or other vessels.

Int. 28. State how far your own ship was visible, and whether or not you let off steam in coming up the harbor.

Ans. We let off steam at the Upper Middle ground; the steam was kept being let off until we struck the vessel, which (the letting off steam) could be heard at a considerable distance, certainly half a mile.

153 Our ship could have been seen when we came past Fort Independence, as there was nothing to obstruct the view.

Int. 29. State whether or not you would have discovered the "McCloskey" sooner than you did if she had been under canvas.

Ans. Yes, because we should have seen her sails; her spars not being distinguished through the rigging and masts of the school-ship.

Int. 30. State whether if the "McCloskey" had been under canvas and with steerage way when discovered by you, she could, or could not, then have avoided the collision.

Ans. She could.

Int. 31. How?

Ans. By starboarding her helm.

Int. 32. Which vessel was running at the greater rate of speed from the time you discovered the "McCloskey" to the time of the blow, the "Java," or the "McCloskey?"

Ans. The "McCloskey."

Int. 33. State whether the shock of the collision was or was not perceptible on board the "Java."

Ans. No, it was not.

Int. 24. State whether or not, if said schooner had been at anchor, the collision would have taken place.

Ans. No.

Int. 35. Why not?

Ans. We could have avoided her by porting our helm, or starboarding; we could have gone either side of her.

Int. 36. State whether, in your opinion, anything could have been done aboard the "Java" after discovering the "McCloskey" to avoid a collision, which was not actually done.

Ans. No, I do not think there could.

Int. 37. Was anything done on board the "Java," in your opinion, which should not have been done after discovering the "McCloskey?"

Ans. I think not.

Int. 38. State by what, in your opinion, the collision was occasioned.

Ans. By the "McCloskey" not being under proper command and steerage way.

154 Int. 39. State how the quartermasters are stationed when in charge of the wheel, and how they are situated for observing objects outside of the ship.

Ans. They are in the wheel-house, covered in, glass front, which is always open going into port; they can see objects over the saloon deck at a distance. The man is, I should think, about a foot and a half above the level of the saloon deck; his head, I mean.

Int. 40. Can he or not see objects at the level of the water, or near it, or can he judge of the distance of objects seen?

Ans. No, he cannot see objects level with the water unless at a considerable distance from the ship; he cannot judge well of the distance of objects seen.

Cross-examination by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. Please to state all that passed between the pilot and yourself, at or near the Slate Ledge Buoy, respecting taking the "Java" inside the school-ship.

Ans. I asked him which side he intended to go of the school-ship, and if there was water to go inside; he said that he was to go inside, as it was the clearest part of the channel, and plenty of water at that time of tide.

Cross-int. 2. What led you to put that question to him? Was he not responsible to the owners for his management?

Ans. Yes, he was responsible for the safe navigation of the vessel; 'twas a very natural question for the captain to ask the pilot.

Cross-int. 3. Had anything passed between him and you before that on that subject on the way up?

Ans. Only in regard to the speed of the vessel, sometimes slowing a little and sometimes——Nothing had passed between us before that as to the docking of the ship.

Cross-int. 4. Had anything passed before that as to which side of the school-ship you would go?

Ans. No.

Cross-int. 5. What had passed between you as to the speed of the vessel, as you have said?

Ans. Only he would tell me as I telegraphed the orders he gave me to the engineer.

155 Cross-int. 6. At the time you put the question to him respecting which side of the school-ship you were to go, had he begun to give the ship her direction by the helm to send her inside, or was she still going on in the main channel?

Ans. She was still going on in the main channel.

Cross-int. 7. After he told you he would take her inside the school-ship, what orders did he give to the helm?

Ans. To port a little, which was done, and the engines to be slowed.

Cross-int. 8. Was that order telegraphed by you?

Ans. Yes.

Cross-int. 9. Was the order to port a little at the same time with the order to slow?

Ans. Yes.

Cross-int. 10. How do you know that the order to slow was obeyed?

Ans. I could see from the reduced speed of the vessel.

Cross-int. 11. How do you know that the order to port a little was obeyed?

Ans. I saw the vessel's head go off to starboard.

Cross-int. 12. Did he then give the order "steady?"

Ans. Yes.

Cross-int. 13. When the order "steady" was obeyed, and the ship got her course, how many points did the school-ship bear on your port bow?

Ans. She was almost right ahead at that time, a little on the port bow, hardly a point.

Cross-int. 14. Were you running for a little abaft her stern, so as to go near under it?

Ans. Yes.

Cross-int. 15. Then, as you drew nearer to her, did she increase her bearings on your port bow somewhat?

Ans. A very little.

Cross-int. 16. Did you change your helm for the vessel under canvas?

Ans. No.

156 Cross-int. 17. When the order was given to stop engines for the vessel under canvas, how many points did the school-ship bear on your port bow?

Ans. I should say one point.

Cross-int. 18. How many when you first saw the "McCloskey?"

Ans. About a point and a half.

Cross-int. 19. If the school-ship did not at any time, from the time your helm was put aport until you saw the "McCloskey," bear more than one point or one point and a half on your port bow, why could you not have seen the "McCloskey" sooner? Had you not a clear view up between the school-ship and the East Boston wharves?

Ans. Yes, we had a clear view up in that line we were going on. There were several other vessels at anchor in the vicinity of the school-ship, to the westward of her, but in the line we were going on there was nothing visible.

Cross-int. 20. Could you not, on the line on which you were going, see your dock, clear of the school-ship to starboard of her?

Ans. No.

Cross-int. 21. Did the school-ship shut off your dock from you when the vessel under canvas passed?

Ans. The school-ship and the other vessels anchored at the westward did so.

Cross-int. 22. At that time did your dock bear from you over the school-ship, or over the vessels at anchor to the westward of the school-ship?

Ans. About over the bow of the school-ship, I take it.

Cross-int. 23. At that time did you see the port side of the school-ship, or the starboard, or both?

Ans. The port side.

Cross-int. 24. When you saw the "McCloskey," could you also see your dock clear of the school-ship?

Ans. Yes.

Cross-int. 25. When could you first see your dock clear of the school-ship?

Ans. When we first saw the "McCloskey."

Cross-int. 26. Could you see the Grand Junction wharves clear of the school-ship?

Ans. At that time, yes.

157 Cross-int. 27. Could you before that time, and how long?

Ans. No.

Cross-int. 28. When the vessel under canvas passed you, how did the Grand Junction wharves bear over the school-ship?

Ans. I should say over her midships.

Cross-int. 29. Was the school-ship all this time tailing down with the tide?

Ans. Yes.

Cross-int. 30. Supposing the "McCloskey" to have been under steerage way, which way ought she to have put her helm to avoid or diminish a collision?

Ans. To starboard.

Cross-int. 31. What else could she have done if she had steerage way on her, to aid in avoiding a collision?

Ans. Nothing else.

Cross-int. 32. If she was drifting with the tide, and had only way enough to keep her head right, what could she have done to aid in avoiding a collision?

Ans. To have made sail—there was a commanding breeze—or else to have anchored.

Cross-int. 33. Suppose she saw you only when you saw her, and was as described in the last question; what could she do?

Ans. Well, nothing. I don't see that the collision could have been avoided in that case.

Cross-int. 34 Would it have been a seamanlike thing to have tried to drop her anchor while going ahead, and a collision as imminent and probable as at that time?

Ans. If he didn't see us sooner than we saw him, certainly not.

Cross-int. 35. You mean, then, do you not, that if the schooner had not headway enough, and there was time enough, she ought either to have got the requisite headway by making sail, or have come to anchor?

Ans. Yes.

Cross-int. 36. Do you say you could have passed the schooner if she

had been lying still at anchor in the very position in which you first saw her?

Ans. Yes.

158 Cross-int. 37. On which side of her would you have passed?

Ans. Either.

Cross-int 38. If so, then it was the fact that she moved from that position that caused the collision, was it?

Ans. Yes, sir.

Cross-int. 39. In which direction did she move from the position in which you first saw her?

Ans. She was drifting down towards us.

Cross-int. 40. Was she drifting on the same line, in the opposite direction, or angling?

Ans. Angling a little.

Cross-int. 41. In which direction angling?

Ans. With her head more down stream.

Cross-int. 42. Do you mean that her head was more to the eastward than your stern?

Ans. Yes.

Cross-int. 43. Then the more she moved from the position in which you first saw her, the more it brought your stern towards her quarter, did it not?

Ans. Yes.

Cross-int. 44. If with your helm astarboard, and she drifting also so as to bring your head more to her quarter, you still struck her abaft her main chains, are you sure you could have gone clear to the eastward of her, if she had been lying still where you first saw her?

Ans. Yes.

Cross-int. 45. Are you sure you could have gone to the westward of her?

Ans. Yes.

Cross-int. 46. If you had intended to go to the westward of her, when she was still, as supposed, you would have put your helm to starboard, would you not?

Ans. Yes.

Cross-int. 47. Do you think that would have carried you clear of her, she being motionless?

Ans. Yes.

Cross-int. 48. Why did it not, then, carry you clear of her, when

159 she was in fact moving so as to carry your head more towards her quarter than if she had been still?

Ans. Because she was drifting down, going with the tide all the time; the way of the "Java" was nearly stopped.

Cross-int. 49. Is that the only answer you have to make to the last question?

Ans. Yes.

Cross-int. 50. Do you mean that the "Java" was so stopped as not to respond quickly to her helm?

Ans. Yes.

Cross-int. 51. Why did you not try to go to the starboard, or eastward of the "McCloskey?"

Ans. We were too close to her; we did starboard. To have gone to the eastward of her, we should have had to have ported.

Cross-int. 52. You mean that as the schooner was going ahead you could not have ported your helm without increasing the danger, do you not?

Ans. Yes.

Cross-int. 53. Do you think that the "Java" did, in fact, shift her head at all to port, after the order to starboard was given?

Ans. Yes.

Cross-int. 54. How much between the order and the collision?

Ans. Half a point.

Cross-int. 55. At what angle did the "Java" run into the "McClosky?"

Ans. I should think, I should say, about two points abaft her beam.

Cross-int. 56. Do you mean that lines drawn from stern to head of each vessel would have made an obtuse angle, of about two points more than a right angle?

Ans. Yes. [The two last questions and answers being repeated, and reread, the witness says he meant to say,] that the starboard sides of the two vessels, as they headed, formed an acute angle of two points less than a right angle.

EDWIN R. MOODIE.

160 *Deposition of Peter Coffin, taken Feb. 5, 1867, before me, Winslow Warren, jr., U. S. Commissioner.*

Direct examination by W. G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation; what has been your experience at sea; how long have you held the position you occupy; how often have you made the voyage from Halifax to Boston in the English steamers?

Ans. My name is Peter Coffin; age, sixty-one; residence, Halifax, Nova Scotia. I am a master mariner until recently; I am now company's pilot in the Cunard service. I have been at sea forty-nine or fifty years. I have held the position I now occupy twenty-three years next May; my duty is to act as pilot coming and going out of Halifax, and on the coast, to the time we take the Boston pilot. For the last eighteen or nineteen years I have been in the habit of making the voyage from Halifax to Boston in the English steamers thirteen times a year; previous to that ten times, as coast pilot.

Int. 2. Were you on board the "Java" on the 7th of November last, at the time of her collision with the schooner "James McCloskey;" and if so, in what capacity?

Ans. I was, as coast pilot, but not in command of the ship at the time of the collision.

Int. 3. When did you take on board the Boston pilot, and who had charge of the navigation and course of the ship from that time to the collision, and at the time of the collision?

Ans. We took him on board twenty or thirty miles from Boston Light; it might have been from twenty to thirty miles. He had charge from that time.

Int. 4. State whether the "Java" had any watch stationed to look out for vessels as she came up the harbor; and if so, what watch, and were they on the lookout?

Ans. There were lookouts stationed on the ship's forecastle, consisting of two seamen and the chief officer, and they were on the lookout. There were likewise two junior officers to pass the word. The captain and pilot were on the upper bridge.

161 Int. 5. Where were you on board the "Java" as she came up the harbor, and at the time of the collision how near to the pilot and master, and what were you doing there?

Ans. I was standing about the vicinity of the upper bridge. I was

on the upper deck, about six feet below the captain and pilot, within speaking distance. I was making general observations, keeping my eyes about me for all concerned, as I generally am, coming up the harbor, to see if there was anything we were likely to come in contact with, for my own satisfaction, and for the benefit of the ship generally.

Int. 6. What was the tide, and the direction of the wind as you came up the harbor?

Ans. The tide was ebb, wind west-northwest—comparatively light.

Int. 7. State whether you observed the school-ship "George M. Barnard" as you came up the harbor, if so how was she heading, and how was she lying as to the course of the "Java," and how was your course directed as regards said ship?

Ans. I saw the school-ship at anchor heading up the harbor, heading the tide, stern down. We were making an angling course to get under her stern, an angle from the way she was heading, she was lying about in our direct course for the dock. We made an attempt, putting our helm to port, to go inside; we were about abreast—a little above—the Slate Ledge Buoy, when the pilot thought it advisable to go inside of her, as there were a number of vessels in the way outside of the school-ship, and to the westward of her.

Int. 8. State at what speed you came up the harbor from the Lower Middle, and if any change in speed was made, state where, and what change.

Ans. At half speed from the Lower Middle; about the Slate Ledge Buoy we changed to slow.

Int. 9. After you ran slow, state whether any change in speed was made, and if so, what change, and for what reason.

Ans. After running slow we then saw a vessel some way ahead of the school-ship, intending to come down inside of her; she was schooner rigged with all sail set. In order to give time for her to get past out of the channel, we stopped.

162 Int. 10. What do you mean by stopped?

Ans. Stopped the engines.

Int. 11. How far astern of the school-ship were you when you stopped?

Ans. Probably two or three lengths of the ship.

Int. 12. How long did you run with the engines stopped? And did, or did not, her engines start ahead again before the collision?

Ans. Probably a minute and a half or two minutes. The engines did not start ahead again before the collision.

Int. 13. State when the "James McCloskey" was first seen on board the "Java."

Ans. About the time that the schooner under sail had got out of our way and we were perhaps half a length astern of the school-ship—the "Java's" bow in a triangular position across the stern of the school-ship.

Int. 14. Where was the "James McCloskey" when you first saw her from the "Java?"

Ans. A little forward of the beam of the school-ship—her starboard beam—perhaps the length of our ship from us in a straight line.

Int. 15. State what you observed of the "James McCloskey." In what position was her sails? Was she, or not, under command or steerage way? Was she moving, and how?

Ans. After she got out, when we first saw her we could see no sails—we then saw they were in the act of hoisting the foresail—the throat of the sail about half up and the peak a good deal down. She was

drifting down with the tide and what little wind there was, not under steerage way.

Int. 18. State what was done on board the "Java" when the "James McCloskey" was discovered.

Ans. The order was given to turn the engines back full speed, and helm put had astarboard.

Int. 17. How quickly was these orders given? Where they executed, and if so, how quickly?

Ans. They were given immediately on seeing her; they were executed as quickly as the engines could be reversed—say ten seconds.

Int. 18. State whether or not the engines had made any revolutions backward at the time of the collision, before the blow.

163 Ans. They had made a number of revolutions back; they had been turning back half a minute.

Int. 19. At what speed was the "Java" moving, after she had stopped her engines, and when you first saw the "McCloskey?"

Ans. Perhaps a knot and a half or two knots through the water; not so much as that by the land.

Int. 20. At what rate was she moving at the time the vessels struck?

Ans. Not more than a half a knot, I should think.

Int. 21. Which vessel was moving the faster from the time you saw the "McCloskey" to the time you struck her, the schooner or the steamer?

Ans. The schooner was drifting down with the tide, whereas we, with the little way that we had on the ship, were laying comparatively still by the bottom; the schooner was moving with the tide faster.

Int. 22. By whom was the "McCloskey" first seen on board the "Java"? And did you, or not, see her as soon as any one?

Ans. I presume she was seen first by the captain and pilot; they, being more elevated than any one else, could see over the school-ship better; I saw her within a few seconds of the time I heard the remark made there was a schooner there; I could see the masts of the vessel.

Int. 23. Why did you not see the "McCloskey" sooner than you did?

Ans. Being directly hid by the school-ship from us, by the hull of the school-ship.

Int. 24. If she had been out of range of the school-ship as you came up from Slate Ledge Buoy, would you, or not, have seen her?

Ans. Yes.

Int. 25. State how you can say that you would have seen her, if she had not been in range of the school-ship.

Ans. There would have been nothing to have obscured the vision between us and the docks, and we were looking to see what there was to be seen up there.

Int. 26. State whether or not you would have discovered the "McCloskey" sooner if she had been under canvas.

Ans. We should, much sooner.

Int. 27. State whether or not the "McCloskey," if under canvas

164 and with steerage way on, when discovered by you, could then have avoided the collision; and if so, how?

Ans. I think it could have been easily avoided; by putting her helm to starboard, there would have been ample room to have cleared.

Int. 28. State whether or not if the "McCloskey" had been at anchor, when first discovered by you, the collision could have been avoided by the "Java."

Ans. It could.

Int. How?

Ans. By keeping our helm to port; by keeping on the same course we were going we could have gone between her and the East Boston wharves, by porting the helm.

Int. 30. State whether or not, in your opinion, anything could have been done on board the "Java" to avoid the collision, which was not done.

Ans. Every possible thing was done on board the "Java" to avoid it that could be done.

Int. 31. Did you notice what the chief officer did on discovering the "McCloskey?"

Ans. Not particularly; I heard an order given; I heard some one halloa to the "McCloskey," to starboard her helm; most likely it was the chief officer, as he was the farthest forward.

Int. 32. State whether or not the "Java" let off steam in coming up the harbor; if so, how long, and how far could the sound be heard?

Ans. We let off steam; I should think under some circumstances it could be heard three miles, and under others half a mile; we began to let off as soon as we entered the Narrows, and as we decreased our speed the steam was let off in the same ratio.

Cross-examination by R. H. Dana, jr., esq., of counsel for libellants.

Cross-int. 1. How do you know that the pilot thought it best to put her helm aport and go inside the school-ship?

Ans. From the fact that the channel was better inside the school-ship than it was outside, clearer to appearance.

Cross-int. 2. What did you hear him say on the subject?

165 Ans. I heard him remark to the captain that the chances were better going inside the school-ship; the channel better, more clear.

Cross-int. 3. Please to state all that you heard him say on the subject, and give it as nearly in his language as you can.

Ans. Not being directly beside the pilot, I was not able to hear all the conversation between the captain and pilot, they being six feet above me; only from general conversation between them they decided upon going inside the school-ship, and after that there were no particular remarks made; they did not vacillate, but continued on that course.

Cross-int. 4. State the best of your recollection of what each said before they made up their minds.

Ans. I heard the pilot remark to the captain that the chances for getting to the dock would be better going inside the school-ship; that was all of any note I heard them say; it didn't require many words.

Cross-int. 5. What did the captain reply to that?

Ans. I didn't hear him make any particular remark; only complied with what the pilot thought was best.

Cross-int. 6. Where was the "Java" when this was said by the pilot?

Ans. A little above, or about, the Slate Ledge buoy.

Cross-int. 7. Was the order then given to port the helm, and by whom?

Ans. The order was given by the pilot. I think the captain sung out; he might have ordered it by the telegraph, but I think he spoke.

Cross-int. 8. Was the helm in fact put to port, on the order being given?

Ans. It was.

Cross-int. 9. How do you know that it was?

Ans. I saw the ship's head change, or in other words, the ship's course.

Cross-int. 10. Did he then call "steady," or telegraph it?

Ans. When the course was sufficiently changed to clear the school-ship.

Cross-int. 11. When the "Java" came to "steady" how did the school-ship bear from your vessel?

Ans. She was probably a point on our port bow.

166 Cross-int. 12. How soon after you came to "steady" did you see the first schooner?

Ans. Probably two minutes; I am not quite sure as to time; the first we saw was a good piece up above the school-ship when we saw her—being visible, under full sail.

Cross-int. 13. How did she bear when first seen, and where was she?

Ans. She was a little above the Grand Junction wharves, and bore in a northerly direction.

Cross-int. 14. Was the school-ship between you and her when you first saw her?

Ans. We first saw her ahead of the school-ship, across the school-ship's bowsprit, or something in that direction.

Cross-int. 15. Did she then pass inside the school-ship?

Ans. She did, after that.

Cross-int. 16. Did you see her sails when the school-ship was between you and her?

Ans. We did; saw her sails all the time, perfectly plain.

Cross-int. 17. Did you change your course to avoid her?

Ans. No; we stopped to avoid her.

Cross-int. 18. Did you not starboard your helm to avoid her?

Ans. No.

Cross-int. 19. Nor port your helm?

Ans. Nor port our helm.

Cross-int. 20. She passed on your starboard hand, did she?

Ans. She passed ahead of us—across our bow as it were.

Cross-int. 21. Across your bow, to starboard or to port?

Ans. To starboard.

Cross-int. 22. Did the sails of this schooner hide the "McCloskey" from you for awhile?

Ans. Not to my knowledge, not at all.

Cross-int. 23. When you saw the "McCloskey" how was the school-ship bearing from your port side?

Ans. The school-ship's stern was like on our bow; like off the luff of our bow.

Cross-int. 24. Did you see the "McCloskey" over, or across the school-ship?

167 Ans. Saw her over the school-ship, her masts.

Cross-int. 25. Over what part of the school-ship did you see her masts?

Ans. First in rather an angling direction across the school-ship, say from her mizzen-rigging to her fore-rigging, in an angling direction across.

Cross-int. 26. You mean from the school-ship's port mizzen-rigging to her starboard fore-rigging, do you?

Ans. I do.

Cross-int. 27. What was done when you so saw her?

Ans. The engines were reversed immediately, as soon as they could

be after the order was given, and the helm was put to starboard, in order to shave as close under the school-ship's stern as possible.

Cross-int. 28. Were the engines in fact reversed before the "McCloskey" came out clear of the school-ship so that her hull was in full sight?

Ans. I think the engines were turning back before the "McCloskey" was in full sight of us out from the school-ship; I know they were in fact.

Cross-int. 29. How do you know that?

Ans. I looked over the side of the ship and saw the motion of the water.

Cross-int. 30. Did you in fact go as close to the school-ship as you could with safety?

Ans. We did.

PETER COFFIN.

Deposition of Charles L. Gardiner, taken Feb. 17, 1869, *before me, Winslow Warren, jr., U. S. Commissioner.*

Direct examination by W'm G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation; how long have you been at sea; in what capacities; what classes of vessels have you commanded and on what voyages?

168 Ans. My name is Charles L. Gardiner; age, forty; residence, Chelsea, Mass. I am a shipmaster. I have been at sea twenty-five years; have been in all capacities—as a common sailor, officer, and captain; have been a master for seventeen years; generally on voyages to the East Indies, though I have been to Europe several times. I have commanded ships of from five hundred to sixteen hundred tons, and one propeller of a thousand tons, for about a year.

Int. 2. Were you a passenger on board the steamer "Java," at the time of her collision with the schooner "James McCloskey," in Boston Harbor, in November, 1866?

Ans. Yes, sir.

Int. 3. Were you on board at the time of the collision, and what opportunity had you of observing the collision?

Ans. I was standing on a tier of cable, forward of the bridge; I had a good opportunity for observing the collision; the place where I stood was two feet higher than the upper deck. I had a clear look-out. I was nearly as high as the officers on the bridge; had as good a look-out as any one could have; I considered I had a good position for gazing about without standing in anybody's way.

Int. 4. How long had you been on the tier of cable before the collision, and what were you doing there?

Ans. I suppose I might have been there two or three minutes. I went there particularly to look at the school-ship, as I saw her laying there. I got up on the tier of cable to look down upon the school-ship's deck.

Int. 5. How was the steamer running, as to speed, at the time you took your place on the tier of cable?

Ans. Well, she was going very slow; can't tell how many miles an hour. I fancy she was going about three knots, as a steamer wouldn't care to go much less.

Int. 6. Was any change made in her speed at or about the time you took your place on the cable, or after that time?

Ans. After that time, or about the time, I think it was after, they stopped the engines.

Int. 7. Did you notice any occasion for stopping the engines; if so, what did you notice?

169 Ans. I saw a schooner going down on our starboard bow under sail; she passed us, I suppose, three hundred feet or more on our starboard side.

Int. 8. How far off from the school-ship were you at the time when the engines stopped?

Ans. I should think the "Java's" bow might have been three hundred and fifty or four hundred feet off; she may have been more than that distance—from one to two lengths off.

Int. 9. How was the school-ship heading as you came up towards her?

Ans. She was heading to the ebb-tide; I suppose about northwest.

Int. 10. What was the course of the steamer "Java" as she came up towards the school-ship?

Ans. The "Java" was heading about three points different from the school-ship—about north by west, I should judge; that is, three points from parallel with the school-ship—more to the northward.

Int. 11. At what distance from the school-ship's stern was your ship's bow when you first noticed the school-ship? State as nearly as you are able.

Ans. I suppose I might have noticed the school-ship for as much as three or four lengths off, or possibly a quarter of a mile.

Int. 12. At that time, how did her stern bear from your bow; how were you heading with regard to her?

Ans. The school-ship was about a point open on our port bow; I suppose we were steering about for the school-ship's stern, so as to pass a hundred feet from her stern, and at that time our course was about three points from her heading.

Int. 13. What did you first see of the schooner "McCloskey;" where was she; how was she heading; how far from you was she; what did you see of her?

Ans. I saw her just coming out past the school-ship's stern; I don't suppose we were more than our length from her. She was, at that time, pretty nearly ahead of us, but heading away from the school-ship at an angle of about three points from the line of the school-ship; she had a small piece of her foresail set. At the time she was hoisting her foresail, trying to get under way, but she did not have steerage-way, I think.

170 Int. 14. By whom was she first discovered on board your ship, and what was done when she was seen?

Ans. What called my special attention to her was when I heard a cry of "starboard" from somebody, and reverse the engines was the order given by the bells; our engines were reversed instantly, probably within fifteen seconds.

Int. 15. What was the effect of reversing your engines?

Ans. It stopped her to such an extent that when we struck the vessel I didn't think it would injure her; in fact, I didn't think it would hit her. I don't think the ship got stern-way, but I thought she was at a dead stop a few seconds before we struck the vessel.

Int. 16. How did you strike the "McCloskey?"

Ans. We struck her, as near as I can remember, a little forward of the main rigging; a glancing blow, three points less than a right angle, as near as I can remember.

Int. 17. Why did you not discover the "James McCloskey" on board the "Java" earlier than you did?

Ans. I should fancy she was hid by the school-ship; if she had had

her canvas spread, she must have been seen by anybody looking that way; her bare spars would not attract attention through the rigging of the school-ship.

Int. 18. State whether any change of helm was made on board your ship after you discovered the "McCloskey."

Ans. I don't know whether there was any or not; I heard the cry of "starboard," but whether the helm was put starboard I don't know; the cry was forward, and I don't know whether it was to our ship or the "McCloskey."

Int. 19. State whether, in your opinion, under the circumstances under which you discovered the "McCloskey," the order to put the helm of the "Java" hard to starboard would or not be the proper order.

Ans. I should think it would; so long as she had headway, the order to starboard was the correct thing.

Int. 20. State whether, in your opinion, from the time you discovered the "James McCloskey," anything was done on board the "Java" which ought not to have been done, and whether anything should have been done by her to avoid the collision which was not done.

171 Ans. I shouldn't think anything was done that ought not to have been done, and they did all they could to avoid the collision; that is, assuming the helm was put to starboard.

Int. 21. In whose charge was the "Java" as she came up the harbor, and at the time of the collision?

Ans. The pilot's, I suppose; I saw him on the bridge, apparently in charge.

Int. 22. State whether or not, in your opinion, there was any rash or hazardous or venturesome navigation on the part of the "Java" in taking her course inside the school-ship on her way to her dock.

Ans. No, nothing rash nor venturesome; nothing more hazardous than under ordinary circumstances in entering port.

Int. 23. State whether, under the circumstances under which you were coming up the harbor, you would consider it proper to take the outside or inside course, and give the reasons for your opinion.

Ans. I should have gone inside, just as we did. In the first place, there were several vessels lying apparently ahead of the school-ship; and then again, by coming up under the school-ship's stern, we could stem wind and tide. There was nothing to be seen inshore, except the vessel that went down outside of us; except for that the channel was clear.

Int. 24. State whether or not, in your opinion, the collision could or could not have been avoided by the schooner after she discovered, or might have discovered, the steamer.

Ans. Yes, I think it might have been, if he had anchored when he saw the steamer; if he had had headway, I should have thought he might have gone clear by keeping his course, or going the way he was heading; if he had been under canvas, he would have gone clear.

Cross-examination by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. What draft was the "Java" at this time?

Ans. I can't answer; I don't know, sir; I could guess at it, that the ship might draw twenty feet, taking into consideration that she had discharged some of her cargo at Halifax; she must have drawn more at Liverpool.

172 Cross-int. 2. Not knowing her draft, do you like to say how far to the eastward of the schooner she could safely go?

Ans. I could not; no, sir.

Cross-int. 3. If the schooner had been seen earlier, and had been, when seen, on the starboard bow or beam of the school-ship, nearly parallel with her, and one hundred or one hundred and fifty feet from her, could you have gone to the eastward of the schooner safely?

Ans. If there had been plenty of water there, I should think she might have safely gone to the eastward of the schooner; if there had been plenty of room, say three hundred feet, eastward of the schooner, I should think it would have been easier to go there than between them, if they were a hundred and fifty feet apart. The steamer would have had to make a pretty sharp turn to go between the schooner and the school-ship, if they were only a hundred or a hundred and fifty feet apart.

Cross-int. 4. You do not know how much water there was to the eastward of the schooner, do you?

Ans. No, sir.

Cross-int. 5. Was not the bridge of the steamer a good deal higher than the rail of the school-ship?

Ans. I should think it was higher, or quite as high.

Cross-int. 6. How many feet higher should you say?

Ans. I should think it likely that the school-ship's rail must have been twenty-three feet from the water. Come to think it over, I should say there couldn't have been much difference between the bridge and the rail; I have rather forgotten about that bridge.

Cross-int. 7. Where was the captain of the "Java" standing as you neared the school-ship, and until the collision?

Ans. That I can't say; I suppose he was on the bridge, but I can't swear to it; I know he was on the bridge a few moments before.

Cross-int. 8. Where was the chief mate; where the pilot?

Ans. I couldn't swear to their positions, either; I suppose that they were at their proper stations. I can swear I saw both of them a few moments before, the chief officer on the forecastle, and the pilot on the bridge.

Cross-int. 9. What did you mean by saying that you had
173 forgotten about the bridge? You have just spoken of it as a place where you saw these officers.

Ans. In regard to that, I have forgotten about the relative height, so that I could not swear as to its being a few feet higher or lower than the rail of the school-ship.

Cross-int. 10. Did you, when you answered, know the height of the school-ship's rail from the water better than you did that of the bridge of the "Java" from the water or from her rail on deck?

Ans. I could be perhaps more likely to judge of the height of a rail of a ship of her tonnage, being more conversable with the height of such ships in ballast.

Cross-int. 11. Cannot you now tell very nearly the height of the bridge above the rail of the "Java?"

Ans. No, sir; I don't remember.

Cross-int. 12. You say it was right for the "Java" to starboard her helm at once on seeing the schooner; why was it so?

Ans. Because the schooner was heading across our bow. I might have said if the ship had answered to starboarding her helm, it would only been necessary for the ship to have changed her position a little. In fact, it wasn't possible for her to have changed it much.

Cross-int. 13. You mean, do you, that if the "Java" had answered her starboard helm a little she would have gone clear of the schooner's stern, between her and the school-ship?

Ans. I do, if the schooner had had any headway; heading as she was, the least motion from us would have cleared her.

Cross-int. 14. Then it was right, was it, for the schooner, if she had any headway, to put her helm to starboard as you did yours?

Ans. Yes, if the schooner had had headway she would have sheered more off, gone farther from us.

Cross-int. 15. Do you not know that the effect of reversing the engines of the "Java" was to turn her head to port?

Ans. Under the circumstances I don't think it would. She reversed her engines, and stopped her headway. I don't think she got stern-way on her at all.

Cross-int. 16. So long as she had headway, would it or not be the effect of reversing her engines to turn her head to port?

174 Ans. It wouldn't have much if any effect upon her, I don't know that it would have any, with her anchor off bottom.

Cross-int. 17. Do you or not know what is the effect on the "Java's" head of reversing her engines, either when still or under headway, or of continuing them reversed when going astern?

Ans. If a screw propeller was lying at anchor, the effect of starting her ahead would be that she would travel round her anchor to port, and if she reversed her engines she would go the other way. When still with her helm amidships, reversing her engines would tend to throw her head to starboard; when under headway, you would deaden her headway, stop the ship, and if she continued the engines reversed, I think the head would pay off to starboard, but not so quick as if she started from a dead stop. If she is going ahead with the helm amidships, and the engines are reversed, I think the immediate effect would be to throw her head a little to starboard, but dreadful little. If she has stern-way on her, and her engines continue reversed, and helm amidships, she would continue to pay off to starboard.

Cross-int. 18. It is not true, then, that the effect of reversing the "Java's" engines was, so far as it affected her at all, to turn her head to the starboard?

Ans. It would slightly; at least I should think it would.

Cross-int. 19. What do you think the effect would be of putting her helm to starboard and reversing her engines at the same time, when she was going ahead about three knots?

Ans. I should think so long as the ship had three-knot force through the water, she would pay off to port, but that could not continue long, with the engines reversed.

Cross-int. 20. As she got down to two knots, what would be the joint effect of helm astarboard, and reversed engines?

Ans. In reply to that, I should hardly know how that ship might operate under those circumstances; she might go one way or the other.

Cross-int. 21. Do you mean to say that the schooner might have come to anchor, and thereby avoided a collision when she saw the steamer?

Ans. I don't know at what moment the schooner saw the steamer.

Cross-int. 22. If the schooner first saw the steamer when she

175 (the schooner) was abreast the waist of the school-ship, would it have had a good effect for her to come to anchor?

Ans. Yes, I think she would have been safer; I think a collision would have been avoided.

Cross-int. 23. How much chain ought she to have let go in such a case?

Ans. I don't know how much water there was there; I suppose there might have been five fathom. If there was five fathom of water I

should think it likely, if the bottom was good holding ground, that eight fathom of chain would have held him for a time; the less chain the better.

Cross-int. 24. As she was going with an ebb tide, what would have been the effect on the schooner of letting go her anchor?

Ans. She would have swung to the tide, without doubt.

Cross-int. 25. As she would have swung round and gone some distance down before she brought to, on a line of the school-ship, do you not think on reflection that if she had steerage-way it would have been better for her to have kept on with her helm astarboard?

Ans. Yes, sir; I do.

Cross-int. 26. If a steamer is going up against an ebb-tide with engines stopped and at the rate of two or three knots, all the time decreasing, and the power to back, she can come to anchor with more ease and safety, can she not, than if going with the tide?

Ans. Yes, she can.

Cross-int. 27. Under such circumstances she can come to at once, can she not, having an ebb-tide and engines reversed?

Ans. Yes, sir; she could stop very quick, but a heavy steamer would be likely to forge ahead; it would depend upon the bottom, what kind of holding it was.

Cross-int. 28. Take this case as a supposed case; suppose the "Java" to be coming up against an ebb-tide with her engines stopped, going at between two and three knots, if she reversed her engines and dropped her anchor some three or four hundred feet below the stern of the school-ship, would it not have stopped her at once?

Ans. She might have gone half a length.

Cross-int. 29. If you had been in command of the "Java," and
176 had known that a schooner was alongside the school-ship, say one hundred and fifty feet from her, and you were to go at an angle of three points with her, would you have gone that side of the school-ship?

Ans. Under the circumstances I should say that I was forced that side.

Cross-int. 30. I mean, would you have gone that side unless forced to by other circumstances?

Ans. That depends upon how near I was to the school-ship when I got that information. If I was far enough to go clear I should have gone to the port side of the school-ship; if I was too near to the school-ship to put my helm to starboard and go to port of her, I should keep on.

Direct examination resumed:

Int. 25. On which side of the school ship did the "Java" go to her dock after the collision?

Ans. She went up inside, on the school-ship's starboard side.

Int. 26. Under the circumstances of this case as observed by you, is it your opinion that the "Java" should have come to anchor on discovering the schooner?

Ans. No, sir.

Int. 27. Why not?

Ans. I should suppose the ship might have been unmanageable; I don't think they could have stopped her in time; she might have tailed round on to the banks.

Cross-examination resumed:

Cross-int. 31. Did you not hesitate a good while before answering the twenty-sixth direct interrogatory?

Ans. Well, I did.

Cross-int. 32. Was it not a simple question?

Ans. It's a question that I ought not to be conversant with so well as the pilot in regard to that matter.

Cross-int. 33. Are you now entirely satisfied that a positive unconditional "no" was the best answer for you to give?

Ans. Yes. I don't think I should have anchored the ship.

177 Cross-int. 34. As she was coming up against the tide with her engines stopped, and at two or three knots, and had the power to reverse engines at the same time, what fear was there that she would tail round on the banks?

Ans. She would lay to the wind and tide when she came to an anchor; she was not directly to the wind and tide; the school-ship was supposed to be laying to the tide; there might have been three or four points difference—three points.

Cross-int. 35. Would she not have swung about three points and then tailed with the school-ship?

Ans. Yes, she would if there had been room for her.

Cross-int. 36. As you have placed her, was there not room enough to come to without running into the school-ship?

Ans. It's a matter of doubt; I don't know how far ahead the steamer might have shot.

Cross-int. 37. Have you not said that under such circumstances, ebb tide and engines reversed, she would have come to at half her length?

Ans. Yes, I did say that; I suppose that might have been the case; those that know the steamer, know better than I what they can do with her.

Cross-int. 38. Have you not already said that when you saw the "McCloskey" you were not nearer than three or four hundred feet from the school-ship?

Ans. No, sir; I have not.

Cross-int. 39. Have you not testified that when you first saw the "McCloskey" you were about less than the "Java's" length from the shool-ship?

Ans. No, sir, I have not; if I remember my answer to that question, I said I was about the "Java's" length from the school-ship, perhaps less; I think those were the words.

Cross-int. 40. What fear was there of the "Java's" going on a bank or flats under such circumstances?

Ans. I merely supposed it was possible for her to have gone on a bank; the bank might have been half a mile from her or half a length, for all that I know.

178 Cross-int. 41. Then if the "Java" may have been her length from the school-ship and could come to at half her length, and would swing about three points and then tail down, and you know of nothing for her to go upon within half a mile, do you still say positively "no," to the twenty-sixth direct interrogatory, with no condition or reservation?

Ans. I don't know really about that; if there is so much room for a ship to swing as that question calls for, it would be better to port the helm and go the other side of the schooner, to the eastward of her, finding her unmanageable.

Cross-int. 42. What objection have you to answering the last question?

Ans. I answer it in the way I before answered it. If there is so much room there, it is better for the ship to keep on and go to her dock; there is no need to anchor. I think I did answer the question.

Cross-int. 43. Was there anything said or implied in my interrogatory about room to the eastward of the schooner, between her and the flats?

Ans. No, there was not.

Cross-int. 44. Why then do you say that if there was so much room the steamer had better go up to eastward of the schooner?

Ans. Why, because the steamer was bound to the docks. Why should she anchor? If there was so much room she would evidently go clear of the schooner.

Cross-int. 45. I mean to say nothing about room to the eastward of the school-ship or schooner, but only this: Suppose the "Java" to have room enough to come to, without running into the school-ship, and not to run on any flats or bank in coming to, and that she could not go between the school-ship and schooner or to eastward of the schooner without danger, why should she not have come to anchor?

Ans. She might have come to anchor if there was nothing in the way, and it was all clear there; from the question I should think that was the only mode of safety for the steamer.

Cross-int. 46. If she could have anchored there without danger of running into any vessel in the process, or of swinging or tailing on any flats, would it not have been safer for all concerned than to attempt to run between the school-ship and schooner, or to the eastward of the schooner, as you saw them?

179 Ans. I think if the schooner had a little headway on her she did right as it was. I mean the steamer did right. I think that answers the question, as I saw them.

Cross-int. 47. You mean, then, that as you saw them, the schooner had headway on her?

Ans. No, sir; I say if she had headway.

Cross-int. 48. Then please answer my question without further delay or evasion.

Ans. I decline to answer. I answer by saying that I don't know whether it would or not. I don't mean that I decline to answer, but that I do not know whether it would or not.

Cross-int. 49. Are you of opinion that if the "Java" had dropped anchor and reversed engines as soon as she saw the schooner she would still have run into the schooner?

Ans. No, I don't believe she would.

Direct examination again resumed:

Int. 28. With what do you mean that the pilot ought to be more conversant than yourself in your answer to the thirty-second cross-interrogatory?

Ans. Because it's the profession of the pilot to bring ships in and out of port and to anchor them.

CHARLES L. GARDINER.

Deposition of Edward C. Gardner.

Direct examination by W'm G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation; how long have you been at sea?

Ans. My name is Edward C. Gardner; age, thirty; I am in the revenue-cutter service of the United States, stationed here now. I am first lieutenant commanding; I have been at sea eleven or twelve years.

180 Int. 2. Are you familiar with Boston harbor?

Ans. I am; I have been on this station four years and a half; have spent my time in going out and coming in the harbor, and being in the harbor.

Int. 3. How were you employed in November, 1866, at the time of the collision of the "Java" and the "McCloskey," in Boston harbor?

Ans. I was executive officer of the revenue-cutter "Pawtuxet," Captain Fengar commanding.

Int. 4 At what time of the day did the collision take place; what was the wind, what the weather, and what the state of the tide?

Ans. At half-past twelve p. m., as near as I can give it, the wind was about northwest; weather pleasant; a pretty fair breeze; tide was about an hour's ebb, not far from that.

Int. 5. Where did the collision take place?

Ans. The schooner was about abreast of the school-ship "George M. Barnard," amidships of her; the school-ship was at her moorings; the schooner was inside of her, towards East Boston, about two or three hundred yards from her.

Int. 6. Where were you at the time of the collision, and what was your vessel doing at the time?

Ans. We were a little ahead of the school-ship, to the westward of her, two or three hundred yards abreast of her port bow; we were laying still; we had been down the harbor to board the steamer "Java;" at the Castle we saw the steamer, and turned round and came up ahead of her; when we were nearly up to the school-ship we stopped, lowered the gig, and Captain Fengar, and Mr. Graves and M. Wright, two custom-house officers, got into her, and pulled up to the head of the school-ship, intending to head the steamer off and board her before she got to her dock.

Int. 7. State what you saw of the steamer "Java," and what you observed of her course as she came up the harbor, before the collision, and how she approached the school-ship.

Ans. When we first saw her she was as far off as Long Island Head; we were down at the Castle; we turned, and came up slowly under one bell, to allow her to catch up with us; she came up the usual ship channel, and about opposite the Slate Ledge buoy I noticed that she headed

181 to go inside the school-ship, steering just about for her stern; I should think she came up very nearly on a line with the school-ship, heading north-northwest, I should think; the angle between the line of the school-ship and the line of the steamer was about two points, I should think; she straightened her course as she came towards the school-ship. When about two-thirds the way up from the Slate Ledge buoy to the school-ship, I noticed that she stopped her engines; she had already slowed before that. I then noticed a schooner under sail coming down inside the school-ship; she passed between Bird Island and the school-ship, going down the harbor, on the starboard side of the steamer. I did not notice that the steamer's engines started ahead again after that. As the steamer came up to the school-ship's stern and about lapped her bow on, on the starboard quarter of the school-ship, off from her a distance of three hundred feet perhaps to the eastward, I noticed her engines moved back, and I judged at full speed, from the way the water was thrown up. I then knew that she had discovered the "McCloskey," which I had previously seen.

Int. 8. State what you had previously seen of the schooner "McCloskey," and what you saw of her up to the time of the collision?

Ans. I noticed a schooner, which turned out to be the "McCloskey;" the first I noticed of her she was drifting down ahead of the school-ship.

When I first saw her she had no sails up; she was drifting down alongside the school-ship, heading off a little to the eastward from her; when I first saw her she was not alongside but ahead of the school-ship, some distance ahead and sagging down towards her with her head to the eastward; she continued heading off to the eastward; when most down to the school-ship she commenced hoisting her foresail; it was not more than half way up at the time of the collision. The three vessels, the schooner, steamer, and school-ship, were so in line that the schooner and steamer were hidden from each other while she was drifting; if the steamer saw her it would be nothing but her topmasts, so that she would suppose her to be at anchor. At the moment of the collision the school-ship was between me and the schooner, so that I could not see the blow. I was on the port bow of the school-ship.

Int. 9. State whether the schooner was or was not under steerage-way when you saw her.

182 Ans. She was not; her foresail bellied out, but did her no good.

Int. 10. State whether or not, if the schooner had at that time been under canvas or under steerage-way, it would have made any difference as to the two vessels coming into collision.

Ans. Yes, sir, it would.

Int. 11. What difference?

Ans. The schooner would have passed to the eastward of the steamer and school-ship, passed clear; there was nothing in the way in that direction; as it was, she passed very nearly clear.

Int. 12. State whether you observed anything at the time which would determine the course of the steamer, whether to go inside or outside of the school-ship in going up to her dock.

Ans. I noticed, when I first noticed she was going inside the shoolship, four or five vessels anchored abreast of her dock, ahead of the school-ship, scattered along ahead of the school-ship. I saw then that she could make much better dock by going inside of the school-ship at that time of tide. If she had gone round these vessels at anchor, the tide and wind, both being on her port side when she headed to her dock, it would be liable to sweep her down on to these vessels at anchor; she would have had to run across their sterns or their hawser; and with one of those long steamers, with wind and tide both on her port, you lose control of her, when she is not under much headway.

Int. 13. At what rate of speed was the "Java" running after she passed Slate Ledge buoy, and at what rate was she moving at the time of the collision?

Ans. She had just about good steerage-way on when she lapped on to the school-ship; she had come slowly from the Slate Ledge buoy two-thirds of the way up, then stopped her engines. Whether after she reversed her engines it brought her to a stand-still or not before she struck would be a matter of judgment; I think she had a little headway on.

Int. 14. (De bene esse.) State whether or not you had, before the collision, seen steamers go up inside the school-ship when she was at her moorings?

Ans. I had, sir.

Int. 15. (De bene esse.) State what steamers, and whether or not it is unusual for them to go up that passage.

183 Ans. I had seen the "Cuba" and the "China" go up that way; the New York and the Philadelphia boats most always go up that way on the ebb tide; they draw fifteen or sixteen feet of water; the Eastern boats go that way frequently, but they are side-wheelers, and only draw seven or eight feet of water.

Int. 16. (De bene esse.) In coming up Boston Harbor with a steamer like the "Java," with the wind and tide as they were on the day of the collision, and with the vessels in the harbor as they were at the time of the collision, state what course in your judgment would be the proper course for the steamer to take in going to her dock at East Boston—the course inside the school-ship, or the course outside the school-ship, and give the reasons for your opinion.

Ans. I should have come up inside of the school-ship, and should consider that the proper course; the reason I have already assigned, there being vessels ahead of the school-ship and abreast the steamer's dock, and coming up inside the steamer had the wind and tide ahead, and thereby was under perfect control. The course was clear of vessels inside, and she could have seen that when below, coming up; that is, it looked clear up to the moment she discovered this schooner.

Int. 17. Examine the chart now shown you and marked A, W. W., Jr. State whether, with a steamer like the "Java," with wind and tide and vessels as they were at the time of the collision, if you had reached the point denoted by the letter H, in the mid channel upon the chart, you would consider it rash or venturesome navigation to take a course inside the school-ship, passing her stern at a distance of about one hundred feet.

(Objected to.)

Ans. I should not. I think the school-ship should be placed farther to the eastward on the chart, but giving her her proper location, I should still say that the proper course would be inside.

Int. 18. State where was your boat at the time of the collision, and is Mr. Wright, who was in the boat, living or dead?

Ans. The gig was a little ahead of the school-ship on the starboard bow, pulling to head the steamer off. Mr. Wright is dead.

184 Cross-examination by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. Before the collision, had your attention been given to the question of going inside or outside of the school-ship, and the circumstances under which you would do either?

Ans. No, sir.

Cross-int. 2. Have you ever been inside the school-ship in the revenue-cutter?

Ans. Yes, sir.

Cross-int. 3. When?

Ans. I can't state the date, but I give the reason why we did, when we did; the reason was that the flats were occupied by vessels, and we took the sweep round inside the school-ship, to come to our anchorage, our anchorage being off of India Wharf. We only drew nine feet in the "Pawtuxet," so had no trouble in going there at any time of tide.

Cross-int. 4. What flats were occupied by vessels?

Ans. You can find them on the map, sir; they call them South Boston Flats, I suppose; when vessels are anchored inside of Slate Ledge buoy, to the northward of the buoy, and southward and westward of the channel, we call that South Boston Flats. They can anchor anywhere outside of the powder-boats, between those and the line, the commissioner's line; inside the powder-boats they would be aground.

Cross-int. 5. Were you a witness at the last trial on behalf of the "Java?"

Ans. I was.

Cross-int. 6. Is a screw steamer of the length and depth of the "Java" difficult to manage, with wind and tide both on her port bow?"

Ans. Yes, sir.

Cross-int. 7. If you were coming up the harbor in a vessel like the "Java," and thought of going inside the school-ship, would you or not desire to see the course clear of vessels before you made the attempt?

Ans. I should.

Cross-int. 8. Do you think it safe for a screw like the "Java" to go inside the school-ship if she keeps her course open all the way, and sees no vessels inside?

185 Ans. Yes, sir; at the time of tide this case refers to.

Cross-int. 9. How many hours ebb do you refer to?

Ans. About an hour.

Cross-int. 10. Would it be if it were two hours ebb?

Ans. Yes, sir; I think so, anything short of half tide.

Cross-int. 11. Do you think the "Java" could have safely gone to the eastward of the schooner as they were?

Ans. That would have been to have gone ahead of her; she was intending to go astern of her. If the schooner had remained stationary there would have been water enough, but as the schooner was drifting to the eastward, I hardly think there would have been water enough, and the steamer would have been likely to go ashore; the steamer would have had to keep pretty near the school-ship.

Cross-int. 12. Do you think that when the "Java" first saw the schooner she could have gone between her and the school-ship?

Ans. No, sir; there wasn't room to keep right on; that's the reason she backed.

Cross-int. 13. When you say "keep right on" do you mean that the "Java" was coming up on a line with the school-ship when she first saw the schooner?

Ans. Her bow had very near lapped on to the starboard quarter of the school-ship, about two or three hundred feet abreast of her to the eastward, inside of the school-ship.

Cross-int. 14. Please answer my preceding question.

Ans. She was very near on a line, inside of her.

Cross-int. 15. Do you think the "Java" first saw the schooner's masts over the school-ship or clear of her?

Ans. I think she saw her masts about ahead of the school-ship, in range.

Cross-int. 16. How far off, then, would the "Java" be from the schooner when she first saw her masts?

Ans. I don't know when she did discover her masts.

Cross-int. 17. Have you not just testified that you thought she first saw them ahead of the school-ship, in range?

Ans. If she saw them at all, that would be the position she would see them.

186 Cross-int. 18. If so, would not the "Java" have had abundant time to keep clear of her?

Ans. Yes, sir, if she knew that she had been under way.

Cross-int. 19. If you had been in command of the "Java" coming up nearly on a line with the school-ship to go inside of her, and saw the masts of a schooner ahead of the school-ship and nearly in range, and did not know whether she was under way or not, what would you have done?

Ans. I should have waited, to have found out.

Cross-int. 20. What do you mean by "waited?"

Ans. I should have stopped the steamer.

Cross-int. 21. If you found she was coming down inside and you were nearly on a line with the school-ship, what would you have done?

Ans. I should have turned back, reversed the engines, and held on where I was.

Cross-int. 22. Did not the "Java" do this?

Ans. She did, when she discovered the schooner herself, but not when she saw her masts. I suppose that other question referred to her masts—when she saw her masts, if she saw them; I don't know if she saw them.

Cross-int. 23. Was it not then too late?

Ans. It turned out to be.

Cross-int. 24. In all your answers have you assumed that the "Java" was coming up very nearly on a line with the school-ship, to go inside of her?

Ans. Yes, sir.

Cross-int. 25. Do you mean so nearly on a line with the school-ship that she could have seen a vessel coming down inside, as soon as that vessel came abreast the bow of the school-ship?

Ans. Yes, sir, abreast of the starboard bow of the school-ship.

Cross-int. 26. If the fact had been that the "Java" was going at such an angle with the school-ship as to shut out from her view all vessels abreast the starboard bow and beam of the school-ship, except where she saw them over the school-ship, would it alter the case?

Ans. She didn't go at such an angle, but everything was open on the starboard beam; it appeared a clear passage on the starboard
187 side until the schooner shot out. If she was at such an angle that she couldn't have seen her passage clear on the starboard side, she should have waited until she could have seen it clear; that would alter the case.

Cross-int. 27. Would you consider it safe navigation for a ship like the "Java," intending to go inside the school-ship, to approach the school-ship's stern at such an angle as to shut out the sight of vessels inside the school-ship?

Ans. No, sir; and she didn't.

Cross-int. 28. Why did you think proper to add the words "and she didn't" to your last answer?

Ans. Because I supposed that he was taking the supposition that she was coming on an angle that would shut them out.

Cross-int. 29. Why could you not answer the supposed case, plainly put as such, and leave it so?

Ans. I could, only I wished to keep the ship in the same place that I had placed her in the first place.

Cross-int. 30. Are you not conscious of a strong bias in favor of the royal mail steamer against the coasting merchant schooner?

Ans. In this case? No, sir.

Cross-int. 31. If the captain and mate of the "Java" should tell you that they came down to the school-ship's stern at such an angle that they could not see any vessel inside the school-ship and abreast her bow and beam, would you or not think you knew better than they did?

Ans. No, sir.

Cross-int. 32. Did you not say at the last trial, that as soon as you saw the "Java" was going inside the school-ship, you knew or feared there would be a collision?

Ans. I did, sir.

Cross-int. 33. Do you, or not, say the same now?

Ans. I do, sir; because I saw the schooner ahead of her drifting down.

Cross-int. 34. Where was the schooner when you first saw that the "Java" was going inside the school-ship and feared a collision?

Ans. I should think three or four hundred feet ahead; a little on the port bow of the school-ship.

Cross-int. 35. Do you think the "Java" could see the schooner
188 as soon as the schooner appeared across the bow of the school-ship, inside of her?

Ans. Yes, sir.

Cross-int. 36. If the schooner had taken a tug from her wharf, which left her ahead of the school-ship under impetus of the tug, and had her foresail one-half or two-thirds up, with wind quartering, and fair tide, do you insist that she could not have been under steerage-way?

Ans. Under those circumstances she might have been, but I didn't see any tug.

Cross-int. 37. Did you not say, at the prior trial, that the schooner crossed the bow of the school-ship, about a quarter of a mile from her?

Ans. I think not, sir.

Cross-int. 38. At what distance from her did the schooner cross her bow?

Ans. She wasn't over a hundred feet from her jib-boom.

Cross-int. 39. Did you say, at the previous trial, that you did not notice the course of the "Java" until she stopped for the first schooner?

Ans. I don't remember whether I did or not.

Cross-int. 40. How is the fact?

Ans. Soon after she passed Slate Ledge buoy I noticed that she was headed to go inside the school-ship. I think that before she stopped for the first schooner, I noticed she was headed to go inside the school-ship.

Cross-int. 41. Did you not testify, at the previous trial, in substance thus: "I cannot tell how far the 'Java' had got up when she changed her course. When I noticed her stop for the schooner crossing was the first time I noticed her course, then the 'Java' was about two-thirds from Slate Ledge to the school-ship?" If not, wherein is that statement of your testimony incorrect?

Ans. I think I did, at the last trial.

Cross-int. 42. Did you not say that there was a pretty good breeze that day?

Ans. I think I did, sir.

Cross-int. 43. Would you take the "Java" inside the school-ship if you knew she was to meet a vessel inside of her?

Ans. No, sir.

189 Direct examination resumed:

Int. 19. Have you any reason to suppose that the "Java" discovered the masts of the "McCloskey" until just before she reversed her engines?

Ans. No, sir.

Int. 20. If the schooner had her canvas up, would she or not have been sooner discovered by the "Java?"

(Objected to.)

Ans. Yes, sir.

EDWARD C. GARDNER.

Deposition of Alvan A. Fengar.

Direct examination by W'm G. Russell, esq., of counsel for respondents:

Int. 1. What is your name, age, residence, and occupation, and how long have you been at sea, and in what capacity; are you or not familiar with Boston harbor?

Ans. My name is Alvan A. Fengar, age thirty-four; I am a master mariner, now in the revenue-cutter service, commanding the revenue cutter "Active." I have been at sea twenty-one years, in all capacities from cabin-boy up. I have commanded barques, brigs, and schooners, and have been sailing-master of the largest class of vessels, frigates, the "Cumberland" and "Minnesota." I am familiar with Boston harbor. I have been here on station the greater part of six years, in and out of the harbor constantly all the time.

Int. 2. How were you employed in November, 1866, at the time of the collision between the steamer "Java" and the schooner "James McCloskey," and did you or not see that collision?

Ans. I was then in command of the revenue steamer "Pawtuxet," on the Boston station. I saw the collision.

Int. 3. Where did the collision take place; at what time; what was the weather, the wind, and tide at the time?

Ans. It took place in Boston harbor, in the vicinity of the
190 school-ship, to the eastward of her, and about abreast of her starboard quarter; about noon, on the first of the ebb-tide, about an hour's ebb; the wind was light from a northerly direction, between north and northwest; the weather, as near as I can recollect, was good, fair weather.

Int. 4. State what you were doing at the time of the collision, and what occasion you had, if any, to observe the "Java."

Ans. I had been down the harbor with my steamer to intercept the "Java," that being my custom on the arrival of all English steamers. She being farther in than we anticipated when we started, and the tide falling, I had concluded not to intercept her until she arrived at her wharf. I steamed up slowly to the southward and westward of the school-ship, so as to come along ahead of the steamer, lowered my gig, took Messrs. Wright and Graves, two inspectors detailed for that duty, sent my vessel under charge of Lieut. Gardner to her anchorage off India wharf, and pulled in the direction of the steamer's wharf at East Boston across the school-ship's bow, intending to board her when she arrived at the wharf.

Int. 5. State all that you observed of the steamer's course, and all that was done by her up to the time of the collision.

Ans. She steamed up mid-channel until abreast of Slate Ledge buoy, then changed her course at Slate Ledge buoy more to the northward to go to the eastward of the school-ship; the change was made by putting her helm to port, making a sweep to the northward and then righting her course up so as to go by the stern of the school-ship. She was running on that course at a slow rate of speed, and before reaching the school-ship stopped her engines entirely; she was then several hundred feet from the stern of the school-ship. There was then a schooner passing down to the eastward inside the school-ship, and I inferred she stopped her engines to give her a chance to get down out of the way; that schooner got past, and the steamer still had sufficient headway (I do not think she started her engines ahead again) to pass the school-ship and to have perfect control of herself; from the range that I was in, her bow was just shutting in by the stern of the school-ship when I

saw her engines reversed, and the water thrown up violently at her stern. I remarked at the time the violence with which the water was thrown up, at least twelve feet; I knew then that they had dis-
191 covered the schooner which I had previously seen drifting down. I was then off the port bow of the school-ship and ahead of her, pulling across her bow; as soon as I saw there was to be a collision, I told our boys to give way so as to pull ahead and witness the collision; I saw it was inevitable. When they struck I had opened up by the school-ship, so that I had a clear view down her starboard side. The "Java" struck the schooner at an angle of, I should judge, about forty-five degrees.

Int. 6. State all that you observed of the schooner and her course, and all that was done by her up to the time of the collision.

Ans. My attention was drawn to the schooner by noticing that the "Java" was coming up inside the school-ship, and this schooner drifting down ahead of the school-ship, with her head pointing to eastward slowly making sail, with an evident intention of passing to the eastward of the school-ship. The schooner hadn't sufficient sail on to have steerage-way, to have control of the vessel. She was drifting a little to the eastward of the line of the school-ship and heading a little more to the eastward than the school-ship's tail, so as to make a little easting all the time. I should judge she had up not over twelve or fifteen feet of the throat of her foresail; they had made the first hoist of the throat, and were making the first hoist of the peak; the sail not drawing but the wind spilled out of it; at the time of the collision the sail may have been up fifteen feet, not over that, I should think. She continued drifting, not having headway enough to be governed by her wheel up to the time of the collision; there was nothing done by her to avoid the collision; she hadn't steerage-way, no control.

Int. 7. Where were you when you saw the steamer change her course to go inside of the school-ship; were you on board your vessel or in your boat?

Ans. I lowered my boat about the time the steamer changed her course, when she was at Slate Ledge. I was then about one mile from her; no, not a mile, about three-quarters of a mile.

Int. 8. State whether you observed anything at the time which would determine the course of the steamer, whether to go inside or outside of the school-ship in going up to her dock.

Ans. There were, at the time the steamer changed her course, some half a dozen vessels ahead and outside the school-ship, at anchor;
192 those would interfere materially with her course to her dock if she went outside, particularly at that stage of the tide; there were no vessels inside. I had sent my boat to board some of those vessels that morning.

Int. 9. (De bene esse.) In coming up Boston Harbor with a steamer like the "Java," with the wind and tide as they were on the day of the collision, and with the vessels in the harbor as they were at the time of the collision, state what course in your judgment would be the proper course for the steamer to take in going to her dock at East Boston, the course inside the school-ship or the course outside the school-ship, and give the reasons for your opinion.

Ans. I should most certainly take the course inside the school-ship, and would consider that the proper one. My reason for doing that would be that I couldn't safely take the course outside across those vessels laying there, and make a sweep and lay my vessel alongside her pier. The way those vessels were situated you would have to go round

them with the steamer, which would bring the wind and tide both on her port side, and there would be danger in making the landing without anchoring, and that would be a great annoyance and great trouble to a vessel like her. By taking the other course you would head wind and tide and make it very safe for a steamer like her to run directly to her pier and throw out the lines, and there was nothing apparent on the inside course in her way. The schooner was not discoverable because she was drifting down in the range of the school-ship's spars and masts, and having no canvas spread was not visible to the steamer. If she had been under canvas the schooner could have got out of the way, having steerage-way and going to the eastward, and there would have been no difficulty in the steamer's going up.

Int. 10. (De bene esse.) Examine the chart now shown you and marked A, W. W., Jr. State whether with a steamer like the "Java," with the wind and tide and vessels as they were at the time of the collision, if you had reached the point denoted by the letter H in the mid-channel upon the chart, you would consider it rash or venturesome navigation to take a course inside the school-ship passing her stern at a distance of about one hundred feet.

(Objected to.)

Ans. I should consider that under the circumstances the only
193 proper way to make the landing with that steamer; there is room enough inside the school-ship, and the risk of going across her stern and having a vessel like this schooner come out from behind her was no greater than we have to encounter constantly in making our way up the harbor.

Int. 11. In giving the opinion you have expressed in your last preceding answer, do you locate the school-ship as she is located on said chart, or how otherwise?

Ans. She should be a little farther to the eastward and northward, and I give my opinion with reference to her true location at her moorings.

Int. 12. (De bene esse.) State whether or not you had, before the collision, seen steamers go up inside the school-ship when she was at her moorings.

Ans. I have several times seen the English steamers, and it is very common for our American steamers to make the sweep round to dock themselves on the Boston side; the exception is rather the other way. I refer to the Philadelphia, Baltimore, and New York steamers more particularly.

Int. 13. State as nearly as you can at what angle with the line of the school-ship was the course of the "Java" at the time she stopped her engines, as stated by you.

Ans. An angle of about thirty or thirty-five degrees.

Int. 14. State whether any change was made in her heading from that time to the time of the collision.

Ans. I could not positively assert; I could not discover any. I heard a call of "hard astarboard," and I supposed the helm of the steamer was put so, but what the call referred to, whether the steamer or schooner, I cannot say. I didn't discover any change in the course of either.

Int. 15. Assuming in this case that the "Java" first discovered the "McCloskey," just as the bow of the steamer came up with the school-ship's stern, state what was the proper course to be pursued on board the "Java."

Ans. To heave her helm hard astarboard, and reverse her engines;

nothing else could be done, and by that she might possibly go between the ship and the schooner; that was the only possible chance, in
194 my opinion. If the schooner had had any headway, she would have cleared her as it was.

Int. 16. Did you testify on the former trial of this cause?

Ans. I did not; being away on duty I could not possibly attend.

Cross-examination by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. When you left your ship in your boat, where did your ship go?

Ans. She went to her anchorage, off India wharf.

Cross-int. 2. Did she start to go to her anchorage as soon as you left her in the boat?

Ans. She did, as soon as I had left her.

Cross-int. 3. As you lay on the port bow of the school-ship, in your boat, did the school-ship shut out from view the harbor?

Ans. Only portions of it; it wouldn't shut out much of the main channel.

Cross-int. 4. Did you see the tug take the schooner "McCloskey" from her wharf?

Ans. I did not; I saw a tug go to her after the collision.

Cross-int. 5. Did you, when you saw the "McCloskey" that day, know that she had been taken out by a tug?

Ans. I did not.

Cross-int. 6. You say that nothing was done on board the schooner to avoid a collision; can you swear that she did not starboard her helm as soon as she saw the "Java?"

Ans. No, I cannot swear to that, but she was not under control of her helm.

Cross-int. 7. If the schooner had received impetus from a tug which left her just ahead of the school-ship and had her foresail from one-half to two-thirds up, the wind on her quarter and filling it, and a fair tide, and she a quick vessel, could you swear that she would not be under steerage-way?

Ans. I think she certainly would be under steerage-way.

Cross-int. 8. Is it your opinion that the "Java," after she changed her course to go inside the school-ship, had the passage inside the school-ship open to view all the way?

195 Ans. She could not have had the passage open all the way, from the position of the school-ship.

Cross-int. 9. Do you think that at the time she stopped her engines for the first vessel, she had a view of the whole passage inside the school-ship?

Ans. I do not.

Cross-int. 10. Do you think that she saw the "McCloskey" until she reversed her engines?

Ans. I do not think she saw her until she reversed her engines; she couldn't possibly have seen her from her position. I said that she could not possibly have seen her; she might possibly have seen her spars, but couldn't have told whether she was under way or at anchor.

Cross-int. 11. If, as you say, she could have seen her spars before she reversed her engines, do you mean that she would have seen them over the school-ship, or in an open passage on the water?

Ans. Over the school-ship, and through her spars and rigging.

Cross-int. 12. How far from the school-ship was the schooner when abreast her waist?

Ans. About a hundred and fifty feet.

Cross-int. 13. Is not the bridge of the "Java" high enough for a man there to see the schooner's hull when the schooner was about one hundred and fifty feet abeam of the school-ship?

Ans. The position of the two vessels would make considerable of a question; when the schooner was abeam of the school-ship, the "Java" was then out clear, so that she was not in the wake of the school-ship.

Cross-int. 14. When the schooner was abeam of the school-ship, and about one hundred and fifty feet off, could she have been seen by the "Java," except over and across the school-ship?

Ans. She could; the school-ship would not have intervened at that time; when the schooner was in that position the steamer was on top of her, or rather afoul of her, would be the better expression.

Cross-int. 15. When the schooner was abreast the starboard bow of the school-ship, could she have been seen by the "Java," except over and across the school-ship?

Ans. She could not.

Cross-int. 16. Now, was not the bridge of the "Java" high-
196 enough to enable a man standing there to see the hull of the schooner when the schooner was off the starboard bow of the school-ship?

Ans. I should judge not.

Cross-int. 17. Please give your reasons for that judgment.

Ans. The school-ship being a very light vessel, and high out of water, and, besides, having a very high house upon deck, and the schooner in that position being very near the ship when she was on her starboard bow, and the steamer several hundred feet at that time astern of the ship, there would be no chance for the pilot or officer in charge of the steamer to see the schooner.

Cross-int. 18. At the time when you think the "Java" first saw the schooner, could the "Java" have gone to the eastward of the schooner?

Ans. I do not think she would have answered her wheel in time, if they had put it to port, to have gone clear of the schooner; I do not think it would have been possible.

Cross-int. 19. If she could have crossed the schooner's hawse, was there water enough to the eastward of the schooner for the "Java" to go to the eastward of the schooner, and also go clear of the flats, as things then were?

Ans. I should judge there was water enough to go to the eastward.

Cross-int. 20. Do you mean that there was water enough to the eastward of the schooner for the "Java" to have made the necessary turn, and swing then, and clear both the schooner and the flats?

Ans. I think there was, inasmuch as the "Java" was going at a very slow rate of speed, and when they started her engines ahead, she would mind her wheel very readily, and there is some five hundred feet in width between the school-ship and the flats.

Cross-int. 21. If there are but five hundred feet between the school-ship and flats, and the schooner was then three hundred feet from the school-ship, and the schooner was still going ahead, and allowing for the length and draft of the "Java," does not your last answer require modification?

Ans. I have not stated the schooner was three hundred feet from the ship; my statement was, the schooner was one hundred and fifty feet from the ship. If the schooner was three hundred feet, it would be impossible for the "Java" to go across her hawse and make the
197 turn, and go clear of the flats. I have made this statement as a

possibility of her going round, but not a probable step under the circumstances.

Cross-int. 22. Are you able to judge so nicely as to the distance of the schooner from the school-ship as to say that she was only one hundred and fifty feet off, giving room for the "Java" to the eastward, while three hundred feet would not give room?

Ans. I do not think I would be able to declare it on a point so nice as that, positively; I am speaking of the probability in such an event.

Cross-int. 23. When the "Java" in your opinion first saw the schooner, could the "Java" have gone between her and the school-ship?

Ans. She could not; do not understand me that there was not room for her to pass between the schooner and the ship; there was room to pass, if she had the proper time to have made the turn necessary to allow her to pass through.

Cross-int. 24. You mean, do you not, that there was room enough, if the "Java" had had time to bring herself on a line with the school-ship?

Ans. I do; or if she could have turned so as to have brought herself to an angle of fifteen degrees with the school-ship she would have gone through.

Cross-int. 25. If the "Java saw the schooner at the time you think she did, what was her best course to take?

Ans. Her best and only course, in my opinion, was to have her wheel hard astarboard, and reverse her engines at full speed.

Cross-int. 26. As she was going very slowly, and against an ebb-tide, would it not have been well for her also to let go her anchor?

Ans. There was not time enough elapsing between their seeing the schooner and the collision to have let go an anchor and to have given sufficient scope of chain to have brought the ship up; no pilot or master, of good judgment, would adopt such method as long as he had steam to depend upon, and had control of the engines of the ship.

Cross-int. 27. At the rate she was going, stemming an ebb-tide, would not the "Java" have brought to at half her length?

Ans. I do not think she would, as the bottom is soft in that part of the harbor, and the anchor would not readily have taken hold; besides, the schooner in coming down with an ebb-tide was bearing down upon the steamer as fast as the drift of the tide would let her.

198 Cross-int. 28. Do you mean that with reversed engines the "Java's" bower would not have held at once?

Ans. It takes considerable time to reverse and get in motion the engines of a heavy propeller like the "Java;" before that could have been done she would have forged ahead more than once or even twice her length, and she had very little room to spare between herself and the schooner at the time she observed the schooner.

Cross-int. 29. Suppose the "Java" to be going two knots against the tide, with her engines still and her rate of course decreasing, do you not think that dropping her anchor at the instant she reversed would have tended to slow her more, and quicker than reversing alone?

Ans. I do not think it would make any perceptible difference in the time her headway could be stopped.

Cross int. 30. If she had seen the schooner twice her length sooner than you think she did, would not the dropping her anchor, as stated in the previous question, have made a perceptible difference?

Ans. If she had seen her twice her length sooner than she did, it would have made a difference, but in that case I think she would have gone clear of the schooner without anchoring; that is, would have gone

under the schooner's stern, providing they were both advanced on the angles they were drifting or sailing proportionably.

Cross-int. 31. How many times her length did the "Java" go from the time she first saw the schooner until the collision?

Ans. Not more than two, according to my judgment.

Cross-int. 32. Where do you think the schooner was, as regards the school-ship, distance and bearings, when she saw the "Java?"

Ans. I cannot say at what time she saw the "Java," but if they saw each other simultaneously, she was then about a hundred feet off the starboard bow of the school-ship, in an easterly direction, and increasing her distance from the school-ship as she passed by her.

Direct examination resumed:

Int. 17. Where was your revenue cutter at the time the two vessels came together?

Ans. She was on her way, had started on her way to her anchorage from the position that I left her on the port quarter of the school-
191 ship; she was then making her turn, from one-quarter to one-third the distance between the school-ship and her anchorage; just the distance I could not positively assert.

A. A. FENGAR.

Deposition of Elbridge G. Martin.

Direct examination by W'm G. Russell, esq., of counsel for respondents:

SEPTEMBER 3, 1869.

Int. 1. What is your name, age, residence and occupation, and how long have you been engaged in it?

Ans. My name is Elbridge G. Martin; age, fifty-four; I reside at East Boston, Mass.; am a branch pilot, and have been since 1834, and for the port of Boston a branch pilot for twenty-nine years.

Int. 2. Will you produce your commission as a branch pilot, that a copy of it may be annexed to this deposition by the commissioner?

Ans. I do produce it. [The same is hereto annexed, marked "1, W. W., Jr."]

Int. 3. Are you familiar with the harbor of Boston, and what classes of vessels have you piloted in and out of that harbor?

Ans. I am familiar with it, consider myself very familiar with it; have piloted all classes of vessels, from the largest frigates to the smallest boats; that has been my business for twenty-nine years.

Int. 4. Are you familiar with the position of the school-ship "George M. Barnard" at her winter moorings in the harbor of Boston?

Ans. I am.

Int. 5. Were you on board the steamship "Java" at the time of her collision with the schooner "McCloskey" in Boston Harbor, and in what capacity?

Ans. I was on board of her, in the capacity of pilot.

Int. 6. Where did you go on board the "Java," and were you or not the first pilot offering to pilot said steamship at her entering the harbor?

Ans. We were from twenty to twenty-five miles from Boston Light, and I was the first pilot that offered to pilot her into port.

200 Int. 7. From the time of your going on board said steamship, who had charge of her navigation and her course up to and at the time of the collision?

Ans. I had sole charge of the ship and her course.

Int. 8. What did you first do on going on board; where were you stationed; who was with you and for what purpose; what lookout, if any, was kept?

Ans. My first order was to go ahead full speed as usual. I was stationed on the bridge, and most of the time the captain was there with me; after we passed the outer light he was there all the time for the purpose of communicating my orders. There were proper officers stationed all over the ship to keep a lookout; and after passing the outer light, Mr. Brown, the chief officer, and his watch were on the forecastle to keep a lookout and obey whatever orders were received from the bridge. Immediately after going aboard I ascertained that the anchors were ready to be let go at a moment's warning; they are always so fixed upon coming into port that they can be let go by simply knocking out a pin.

Int. 9. What was the wind and the weather, and the state of the tide at the time of the collision?

Ans. The wind was about west-northwest, about a three-knot breeze; fine, fair weather; tide about one hour ebb, a full spring tide.

Int. 10. State how you passed the Lower Middle, and your course from that time until the collision, all that you did, and all that took place up to and including the time of the collision.

Ans. At the Lower Middle we went half speed, and continued at half speed until we got to the Slate Ledge buoy; by the time that I got there I found by observation that my track to my dock was clearest to go inside the school-ship; I observed all the way up from the Lower Middle with my glasses in order to determine which was the clearest track to go. At the Upper Middle, I could see that there was nothing inside the school-ship to prevent my going to my dock; I could see that perfectly, distinctly, or I should not have gone there. My course from passing the Upper Middle was northwest, half west; that's the usual course for that state of tide. I found when I was opposite Slate Ledge buoy that it was my proper course to go inside the school-ship, and I ordered the helm a-port to go under the school-ship's stern. I observed there
201 were a number of vessels lying at anchor to the westward of the school-ship, on the way to my dock, some five or six of them, so that it would have been dangerous to have gone between them; that was my reason for going inside the school-ship, because it was a clear track inside, and a foul one outside of the school-ship. I ported my helm until I brought the ship to go on a line just clear of the stern of the school-ship, and then slowed her down, intending to pass within a hundred feet or less of the school-ship's stern; we slowed down to about four knots; when within about three or four lengths of the school-ship there was a schooner made coming down by East Boston Ferry, inside the school-ship, under full canvass; we then stopped the engine, to make a sure thing of the schooner's going clear of us; the schooner went entirely clear, passed to the north and east of us, with ample room; when she was entirely clear, and we were within a length and a half of the school-ship's stern, and before our engines had started again, I discovered something moving in the range of the school-ship, about the main rigging, between the main and mizzen rigging of the school-ship; directly, I discovered a vessel's jib-boom and bows coming out clear of the school-ship's stern. This proved to be the schooner "James McCloskey," drifting down with the ebb-tide, with no sails set, but had commenced hoisting her foresail, which was about one-third of the way up; the peak of the foresail was not hoisted, was not so high as the

throat. After seeing the schooner's jib-boom and bows, I gave the order to turn back full speed and helm hard astarboard; that was done in order, if possible, to avoid the collision, and if it must come, to ease it as much as possible. I gave the order as soon as I could make out what the moving object was; it might have been a minute from the time I saw the first motion, not over a minute, sure. The order was given by myself first to starboard and go back full speed, which Captain Moodie gave by telegraph and by voice also. Captain Moodie gave the orders instantly after me; the orders were executed instantly, as quick as it was possible to do, the engine being at a dead stop at the time. The ship started back, started to go astern at once; I mean that the ship started to go astern very soon after the engines were reversed, as soon as it was possible to check her way. The putting her helm to starboard brought the ship's head to port; she might have ported a point
202 before the collision, but not enough to avoid it. We struck the schooner just abaft the main rigging, a glancing blow, staving in her side and causing her to leak badly. At the time of the blow the ship's movement was hardly perceptible; she was as near stopped as she could be without being stopped. After that we backed astern a length perhaps, and in so backing, her head fell off to the eastward a little, perhaps a point, owing to the action of the screw. I then called a tug-boat and gave them a hawser from my port bow to straighten the ship for her dock again. She straightened me up, and we passed up inside the school-ship, as I intended to go at first.

Int. 11. State when the schooner "McCloskey" was discovered from the forecastle of your ship and by whom, and whether before or after she was discovered by you, and how long before or after, and what was done on the forecastle.

Ans. There was hardly any difference between Mr. Brown's seeing her on the forecastle, and myself and the captain; I think we saw her first on the bridge, the captain and myself. I instantly, as I said before, gave the order to turn back, and Mr. Brown instantly followed by singing out to the schooner to hard astarboard his helm; these orders were very close together; my impression is that Mr. Brown gave that order to the schooner to hard astarboard instantly after the giving of my order.

Int. 12. At the time you first saw the schooner "McCloskey," where was she in relation to the school-ship, and how far off from your bow was she?

Ans. She was very nearly abreast the starboard bow of the school-ship—she might have been two lengths of my ship from my bow—my bow had not come up to the school-ship's stern when I saw the schooner.

Int. 13. How was the schooner heading at the time you first saw her, with reference to the line of the school-ship?

Ans. She was heading off from the line of the school-ship, two or three points perhaps, to the northward and eastward.

Int. 14. How was she moving at the time, and was she or not under steerage way?

(Objected to.)

Ans. She was drifting with the tide, very little headway, not
203 steerage way at all; she was going through the water scarcely any, merely drifting with the tide, not having commanding way on her.

Int. 15. Was her foresail drawing at the time, or not?

(Objected to.)

Ans. No, her foresail was not; there was not enough of it up to draw, to effect anything.

Int. 16. At what angle with the line of the school-ship was the "Java" heading at the time you discovered the "McCloskey," and for what point on the East Boston shore were you then heading?

Ans. We were heading across her stern, perhaps five or six points. The difference between the line of her heading and the line of our heading was about two points. (After the first paragraph of this answer, the witness took two blocks and arranged them to show the line of the two vessels, and stated that the angle there shown between the two lines was about two points, and the counsel agreed that the angle so shown was about two points.) If we had headed two points more to port, we should have been on the same line as the school-ship. We were heading about for the third or fourth wharf below our dock.

Int. 17. State what prevented your discovering the schooner "McCloskey" on board the "Java" earlier than you did.

Ans. The school-ship prevented my seeing her; she was right in the range of the school-ship; if she had had canvas up I should have seen her over the school-ship just as I did the other. The school-ship's hull is sixteen or seventeen feet out of water; she is quite light.

Int. 18. State whether after you discovered the "McCloskey," anything could have been done by her to avoid the collision; and if so, what?

Ans. I don't know that the schooner could have done anything else than she did, put her helm to starboard and drift along; there wasn't time to put canvas on and get any impetus through the water before the collision occurred.

Int. 19. If she had been under canvas, could she or not have done anything to avoid the collision; and if so, what?

(Objected to.)

Ans. If she had had full canvas on her, or one-half her canvas on her, she would have gone clear of us without any trouble.

Int. When you decided at Slate Ledge buoy to go inside the
204 school-ship as you have stated, did you or not consult Capt. Moodie about so doing? State what took place, if anything, between yourself and Capt. Moodie at the time.

(Objected to.)

Ans. When I put my wheel to port from the Slate Ledge buoy to go inside the school-ship, Capt. Moodie asked me if there was water enough. I told him there was ample water, and as the channel inside her was entirely clear of vessels it was our safest course to our dock.

Int. 21. What would have been your course to your dock after passing the school-ship's stern, if you had not met the "McCloskey?"

Ans. I should have kept my helm to starboard, going round the school-ship's stern until she headed very nearly for the dock, then gone ahead until within three or four lengths of the dock, then starboarded a little more, which would have carried me close to the dock.

Int. 22. What are the steering qualities of the "Java" for making such a course as you intended?

Ans. She steers as well as any ship I was ever on board of, of that class, and better than a great many. A long ship like that cannot be turned as quick as a shorter one, but to sheer a point while going ahead, she will sheer as quick as any ship.

Int. 23. Examine the chart now shown you marked "Exhibit A, W. W. R.," and state at what point, as shown on that chart, you put your helm to port to go inside the school-ship.

Ans. At the point indicated by the letter C in the word "Channel."

Int. 24. For what were you heading before you made the change to go inside the school-ship, and how many points did you change for that purpose?

Ans. We were heading for the south part of Commercial wharf, but we changed about two and a half points to starboard.

Int. 25. How did the school-ship head at the time of the collision?

Ans. About west-northwest.

Int. 26. Examine the chart now shown you designated as Mr. Boschke's plan, and state whether the position and heading of the school-ship as there shown are as they were at the time of the collision, or how otherwise.

Ans. I should think the position of the school-ship was cor-
205 rectly laid by this chart. I think she headed more to the north, from a half point to a point, than laid down on the chart.

Int. 27. What is the direction of the tide at one hour's ebb at the place where the school-ship lies?

Ans. The course of the tide would be about east-southeast, very nearly as the school-ship tails on this chart.

Int. 28. Does, or does not the tide at that place at one hour's ebb make across Bird Island shoal, or in that direction?

Ans. No, it doesn't make across Bird Island shoal, it makes outside; farther inside, down close by the wharf, it makes between Bird Island and East Boston, but that is an entirely different tide; out in the channel where the school-ship lies we have the natural tide running about east-southeast; the tides divide at the point of Bird Island shoal.

Int. 29. State whether in your opinion at the present time, with the wind and tide and vessels as they were at the time of the collision, it was a rash or venturesome act of navigation for you to attempt to go inside the school-ship, with the "Java," at that time, or otherwise, [and give the reasons for you opinion.]

(Part of interrogatory between brackets objected to.)

Ans. It was not a rash act by any means; I certainly should never have attempted it if I had considered it a rash act; it was decidedly the safest track I could take to my dock; the outside track would not have been a proper one, because my track was obstructed by vessels at anchor, so I could not get to my dock. Under the same circumstances I should to-day take the same course, in preference to any by which it was possible to get to my dock. There was a good channel inside the school-ship, certainly four hundred feet wide, giving us good room, plenty of good steering room, and it was the safest course I could take. The channel there was at least four hundred feet wide, with water enough for the "Java"; according to the chart, there is at least five hundred feet width of channel. If I had gone outside I should have had to go up toward Long Wharf, leaving the vessels at anchor on my right, and then have turned to go to my dock, which I could not have done with a vessel of the length of the "Java" without the help
206 of tugs. If I had gone round or across them, at that time of tide, there was great danger of our sagging down on to them. I should not have considered it a seamanlike act to have gone round or across them, at that time of tide.

Int. 30. (De bene esse.) State whether you are aware of any rule or custom for the Cunard steamers or other large steamers to avoid passing inside the school-ship in entering Boston Harbor.

Ans. I am not.

Int. 31. (De bene esse.) What knowledge have you as to the practice or custom of the Cunard and other steamers in that respect?

Ans. I have seen a great many large steamers, larger than the Cunard, wider than they, go inside. I have been in with three Cunard steamers myself, two going down and one up, including the "Java" this time, and I know of other Cunarders going there. I have seen the New York, the Philadelphia and the Baltimore steamers go inside; the New York particularly go there to shorten their course to their wharf, Battery Wharf; they generally go there. Some of the New York boats are sixteen hundred tons; they advertise so; I know it by their advertisement, and by seeing them constantly; they run daily. The eastern boats also go there, whenever they find they can make their turn to get to their dock easier by going that way.

Int. 32. State whether the danger of collision with an unseen vessel incurred by running past the stern of a ship lying at anchor, as you ran by the school-ship, is an ordinary or extraordinary one, and how common or uncommon such risk is in piloting a ship into Boston Harbor.

(Objected to.)

Ans. We have to take those risks with almost every ship we come up with, going by ship's sterns or their jib-booms; we are obliged sometimes to go within ten feet of the stern, just go by, but we generally don't like to go within fifty feet. There is the same danger in passing any ship that there was in passing the school-ship, namely, the danger of a vessel's coming out from behind her. It is common for vessels to anchor in the channel, so that we have to go very near them, and avoid them as we can.

Int. 33. State whether in your opinion, after you discovered the "McCloskey," anything could have been done on board the "Java"
207 to prevent the collision which was not done, or whether anything was done on board which ought not to have been done.

(Objected to.)

Ans. I think we did nothing that ought not to have been done, and we neglected doing nothing that could have been done to avoid the collision.

Int. 34. State whether in your opinion it would have been safe or proper, or otherwise, for you to bring the "Java" to anchor after you discovered the "McCloskey"; give the reasons for your opinion.

Ans. No, I don't think it would have been safe to have anchored the "Java," when I first discovered the "McCloskey." In the first place, if I had let go the anchor when I first discovered the "McCloskey" it would have parted the chain, as it could not have borne the strain that would have been put upon it, or it would have parted something else. If it had held, it would have been likely to have hauled my ship's head round into the school-ship. It would have been likely to have injured the ship's bottom; if the ship had run over her anchor it might have gone through the ship's bottom; such instances have been known. We should have lost the control of the ship, if the anchor had brought her up, and had to begin all over anew with tug-boats.

Int. 35. Would you consider it seamanlike or proper to anchor a ship like the "Java" while under way, expecting her to drag her anchor fifty feet?

(Objected to.)

Ans. No.

Int. 36. Why not?

Ans. Because it would be likely to throw the ship out of her course, or snap the chain off, or rip the windlass out of the ship, or do some damage.

Int. 37. State whether or not at the time of the collision there were

any vessels at anchor or otherwise to leeward of the "McCloskey" to interfere with her putting her helm to starboard, when she first discovered you.

Ans. Not a vessel.

Adjourned to Sept. 6, 10 a. m.

208 Cross-examination by R. H. Dana, jr., esq., of counsel for libellants:

Cross-int. 1. Is it, or not, true that this was the first time you ever attempted to bring a Cunard steamer up the harbor inside the school-ship?

Ans. It's the first time I ever went inside her with a steamship, a Cunard ship, in coming up the harbor.

Cross-int. 2. How many years have you been bringing Cunard steamers up the harbor?

Ans. Well, twenty-three or four years, I should think.

Cross-int. 3. State all the reasons which you considered to have been objections to taking the "Java" outside the school-ship at the time, omitting any that may have been suggested to you, or have occurred to you since.

Ans. The reasons that I didn't go outside the school-ship were because there were vessels at anchor to the westward of the ship in the way of the dock; [the next reason is that there were no vessels at anchor between the school-ship and East Boston, not one; and there was room enough and tide enough to go to the dock inside the school-ship with more safety than any other passage I could take.]

(Part in brackets objected to by Mr. Dana as irresponsive.)

Cross-int. 4. Then the only objections to going outside of the school-ship were the vessels at anchor to the westward of her. Is it so?

Ans. No, that isn't all the objections, the vessels simply being at anchor there; I should have had to have gone up round the vessels and turned my ship for the dock, which I did not at the time think possible to do.

Cross-int. 5. Do you mean that you thought it impossible to dock your vessel if you went outside the school-ship?

Ans. I do, without help.

Cross-int. 6. What do you mean by help?

Ans. By having tug-boats to help me turn my ship, and, if possible, to keep her from sagging down on to those vessels at anchor.

Cross-int. 7. Have you ever had the aid of tug-boats in docking the large-class Cunard steamers?

Ans. Yes.

209 Cross-int. 8. Have not the large-class Cunard steamers for the last fifteen years or so very generally had the aid of tugs in docking?

Ans. Very generally they have, since the long ships have come in play; the screw-ships since they have come into use have generally had the aid of tugs to come up the harbor, in nine cases out of ten; not to come up the harbor, to go into the docks, I mean.

Cross-int. 9. How many vessels were at anchor to westward of the school-ship which you would have had to go round?

Ans. Five at least; perhaps one or two more.

Cross-int. 10. How near to the school-ship were they?

Ans. They were all the way from fifty fathom to two or three hundred fathom, or four or five hundred fathom, to the westward of her, of course I couldn't tell exactly.

Cross-int. 11. When you use a tug, where does she take hold of you; how far from the dock, when the farthest?

Ans. When we attempt to enter the dock, get close to the dock, we stop the steamer as close to the mouth of the dock as possible; we then have a tug or tugs, to turn the ship's head into the dock, sometimes one and sometimes more, according to the strength of the wind and tide.

Cross-int. 12. Is there any objection to availing yourself of the aid of a tug or tugs earlier than that, if the state of things makes their earlier aid desirable?

Ans. No.

Cross-int. 13. Was there not a tug out for you and near the school-ship, before the collision?

Ans. There was.

Cross-int. 14. What was her name, and who commanded her?

Ans. I think it was the "Clover," Captain Hinckley.

Cross-int. 15. Were you on the bridge when you first saw the vessel which you ran into?

Ans. I was.

Cross-int. 16. How high was the bridge above water?

Ans. I don't know how high the bridge was; I can only guess. I should think about twenty-three to twenty-four feet.

Cross-int. 17. State exactly where the schooner was as to the school-ship, when you first saw her masts and rigging.

210 Ans. Well, she was somewhere between the main and mizzen rigging; nearer the mizzen than the main; somewhere near the after part of the ship.

Cross-int. 18. Could you see her hull when you first made out her rigging and masts?

Ans. No.

Cross-int. 19. If the bridge was about twenty-three or twenty-four feet above the water, and the school-ship was about sixteen feet above, why could you not see the schooner's hull over the school-ship?

Ans. Because it wasn't in sight; the school-ship's hull obstructed her.

Cross-int. 20. Did you see any part of the schooner's hull before her bowsprit and head came out clear of the school-ship's stern?

Ans. No.

Cross-int. 21. When you first saw that the object seen across the school-ship was a schooner going down, did you think it necessary to give any order?

Ans. Yes.

Cross-int. 22. Did you, or not, wait before giving any order until you saw her bow come out clear of the school-ship's stern?

Ans. The first thing that attracted my attention that she was a vessel moving down was a piece of a sail, a piece of her foresail which was then being hoisted. The throat of the sail about one-third up, the peak of the sail hanging down. I then gave my orders.

(Mr. Dana objects to the above answer as not being responsive, and as introducing irrelevant matter.)

Cross-int. 23. Please answer the previous question exactly, without introducing any matter which you may think will aid you, and is not in answer to the question.

Ans. Her hull was not out. I saw her foresail and her jib-boom all at one glance.

Cross-int. 24. Please answer the twenty-second cross-interrogatory directly and distinctly, without evasion or addition.

Ans. No, I did not see her bow out clear of the stern when I gave the order.

Cross-int. 25. How far was your bow from the school-ship when
211 you first saw that there was a schooner going down the other side of the school-ship?

Ans. Two or three lengths perhaps.

Cross-int. 26. How much is a length you refer to?

Ans. A length of the ship, the steamer.

Cross-int. 27. How much is that?

Ans. Some three hundred and fifty feet.

Cross-int. 28. How many feet off was your bow from the schooner's bow when her bow first came out from under the school-ship's stern?

Ans. I should think when it came out it might have been a length of the ship, the steamer.

Cross-int. 29. Do you think that the orders to back and starboard were both given and heard before the schooner's bow came out from under the school-ship's stern?

Ans. Yes, before or about; but perhaps not before her jib-boom came out, while her foresail was over the school-ship's quarter.

Cross-int. 30. In your answer to tenth interrogatory you say the ship started back, began giving backway; do you mean to swear that you saw and noticed that before the collision?

Ans. No, I don't mean that she went backwards before the collision; I mean that we were getting her back as fast as we could.

Cross-int 31. If you were coming up with a large screw Cunarder in in mid-day, fine weather, and the first of the ebb, and saw five or six vessels at anchor to westward of the school-ship, about where these were, and that you could not go to the eastward of the school-ship without danger of collision with a vessel or the school-ship, what should you do?

Ans. I should take the passage where I thought there was the least danger of the two.

Cross-int. 32. Should you go on in such case where each was dangerous, without the aid of a tug?

Ans. No, I should not.

Cross-int. 33. If each course was dangerous, would it not occur to you to let go your anchor, if your engines had previously been stopped?

Ans. No. I should get my tug and feel my way along the best way I could.

212 Cross-int. 34. Suppose when you saw that each course was dangerous, no tug was at hand, would you not anchor?

Ans. If the danger was great I should.

Cross-int. 35. What objections would there be to anchoring in such a state of wind, weather, speed, and tide, except labor and loss of time?

Ans. None, that I know of; labor, loss of time, and expense to the ship.

Cross-int 36. If, when you came to the point where you say you first ported your helm to go inside the school-ship, you had seen a vessel or two at anchor between her and the East Boston flats, what should you have done?

Ans. I should have gone just as I did go, if there had been room enough between them and the school-ship.

Cross-int. 37. Suppose you thought there was not?

Ans. Then I shouldn't have gone there; there must have been room

one side or the other. If they were too near to prevent me from going between them and the school-ship, they would not have been far enough off to prevent me from going between them and East Boston.

Cross-int. 38. If you were convinced that vessels so lay that you could not go inside the school-ship, what should you have done?

Ans. I should have gone along outside the school-ship, and done the best I could.

Cross-int. 39. Do you mean by your thirty-seventh cross-answer to say that you think that at one hour's ebb and a vessel or two at anchor between the school-ship and the flats, as near to the school-ship as would be usual and proper, there would be still room enough between the schooners and the flats to have taken the "Java" through there with safety?

Ans. Yes.

Cross-int. 40. You have no hesitation on that point, have you?

Ans. No.

Cross-int. 41. Suppose if you were taking her through under such circumstances, and were to meet a sailing schooner coming down the same passage you were going up, what could you do?

Ans. Do the same that I could do in any other part of the harbor—try to avoid her, to get clear of difficulty.

213 Cross-int. 42. How would you try to avoid that particular difficulty there?

Ans. The same as I should in any other place.

Cross-int. 43. Is that all the answer you are willing to make to the forty-first cross interrogatory?

Ans. I can give other reasons for pursuing that course. That is not all the answer I am willing to make.

Cross-int. 44. Give any further answer you have to the forty-first cross-interrogatory.

Ans. I am perfectly willing to give all the enlightenment I can on the subject. I should hail the schooner the moment she was within hearing distance and ask them to port or starboard, whichever I thought would give us the most room. Whichever she done, I should shape my course to go clear of her, if possible.

Cross-int. 45. Do you mean to say that if there were two schooners in a line at anchor inside the school-ship, giving her a reasonably wide berth, there is also room for a schooner and the "Java" to pass between the schooners at anchor and flats clear of the flats and no serious danger of collision or of driving ashore?

Ans. I do—ample room—at that time of tide.

Cross-int. 46. If you had seen the "James McCloskey" coming down just as she was, and you had time and distance to change your course and go outside of the school-ship, would you have done it, if you saw there was danger of collision if you kept on?

Ans. Certainly I should—I never run into danger if I can avoid it.

Cross-int. 47. When your ship was her length or a length and a half from the school-ship, do you think it was so shoal under your bottom that you would have struck one of your anchors, or that it might have gone through your bottom?

Ans. No, not at that distance; she might have dragged it into shoal water where it would have gone through her bottom.

Cross-int. 48. Would there be such danger at the place your vessels actually collided?

Ans. Well, I shouldn't be willing to say that there would have been

positive danger. I don't think there would have been danger provided it remained in the place where it was let go.

214 Cross-int. 49. What was the draft of the steamer then?

Ans. Between eighteen and a half and nineteen feet; nearer nineteen than eighteen.

Cross-int. 50. What depth of water would have created a danger that an anchor might injure or go through her bottom?

Ans. Well, twenty-one feet, twenty-two feet perhaps; from twenty-one to twenty-three feet. I don't know exactly how long the flukes of the anchor are; I think about five feet.

Cross-int. 51. Do you think that at the rate you were actually going and your engines stationary, against an ebb tide, with a light wind, and fine weather, with an order given to back your engines, there was real danger of parting your chain?

Ans. I do.

Cross-int. 52. If the "Java" had been as long with her engines stopped as you say, and had but little way on her, and a three-knot tide against her, and her engines reversed just before letting go, do you say that letting go her anchor would have created danger of parting chain?

Ans. I do.

Direct examination resumed:

Int. 38. Have you stated, or do you mean to state as a fact, that there was a three-knot tide at the time of the collision?

Ans. I never did that I know of.

Int. 39. State whether or not, before the time of this collision, you had ever brought a Cunard steamer up the harbor inside the moorings of the school-ship.

Ans. I have.

Int. 40. State whether once or more times.

Ans. Once before the case of the "Java."

Int. 41. When you speak in answer to the fiftieth cross-interrogatory of the length of the flukes of the "Java's" anchors, what do you mean?

Ans. I mean that the arm of the anchor would be five feet long striking out from the shank.

Int. 42. If one fluke of the anchor rested on the bottom, how high from the bottom would the other fluke project?

215 Ans. If it simply rested on the bottom the upper part of the other fluke would be some nine feet from the bottom.

Int. 43. Suppose the anchor rested flatwise on the bottom, how high would the anchor-stock project from the bottom?

Ans. About the same distance; perhaps a little more if anything.

Int. 44. Would the anchor hold if it rested in that position?

Ans. No.

Cross-examination resumed:

Cross-int. 53. How many knots was the tide at the time of the collision?

Ans. It may have been one knot.

Cross-int. 54. Please answer the fifty-second cross-interrogatory with one knot substituted for three knots.

Ans. I do—I answer as before.

Cross-int. 55. Does your answer to re-direct interrogatory forty-two suppose such a bottom as there was there?

Ans. Well, I should suppose that with the bottom there was there it might have sunk about a foot into the mud.

Cross-int. 56. Would not an anchor as heavy as yours fairly let go there have sunk more than a foot into the mud?

Ans. Well, I don't know exactly how deep the mud was there. I know that it is generally soft bottom, though in some places it is hard.

Cross-int. 57. Suppose it to have been soft there.

Ans. I should think it would—it might have sunk two feet—but that would have been very soft bottom where it would sink two feet.

Cross-int. 58. In answer to the thirty-ninth re-direct interrogatory, do you mean that the school-ship was not there at the time you brought the vessel up?

Ans. I do—I mean she was not there—but her moorings were.

ELBRIDGE G. MARTIN.

216 EXHIBIT I, W. W., JR.

Commonwealth of Massachusetts to Elbridge Gerry Martin, of Boston, in the county of Suffolk, greeting:

Whereas by law the commissioners of pilots in and for the harbor of Boston are empowered to appoint and commission such persons as pilots for the harbor of Boston as may be approved by the board of trustees of the Boston Marine Society; therefore, reposing especial trust and confidence in your ability, skill, and integrity, we, the undersigned commissioners of pilots in and for the harbor of Boston, do by these presents appoint you, the said Elbridge G. Martin, to be a pilot for the pilotage of vessels into and out of the harbor or port of Boston, in this Commonwealth. You are, therefore, carefully and diligently to discharge the duties of a pilot for the harbor of Boston aforesaid, and to take charge of any vessel or vessels (except fishing vessels and vessels bound to or coming from any port within the Commonwealth, and all vessels of less than two hundred tons, sailing under a coasting license.) You are to exhibit this commission to the master or owner of any vessel who may wish to see your authority to act as a pilot; and you are to be governed by such rules and regulations and to receive such fees as may be prescribed, in conformity to the provisions of the law.

The original commission issued 4 Nov., 1842.

Given at Boston under the hands of the commissioners of pilots in and for the harbor of Boston, this sixteenth day of January, A. D. 1851.

CALEB CURTIS,
(Signed) HENRY K. LORING,
Commissioners.

217 *Deposition of Abel F. Hayden.*

Direct examination by W'm G. Russel, esq., of counsel for respondents.

SEPT. 14, 1869.

Int. 1. What is your name, age, residence, and occupation, and how long have you been engaged in it?

Ans. My name is Abel F. Hayden, age thirty-four, residence Boston, Mass. I am a pilot; I have been engaged in the business since 1852. I received my commission as pilot for the port of Boston in 1858, and as a full branch pilot in 1860.

Int. 2. Are you or not familiar with the harbor of Boston; what classes of vessels have you been accustomed to pilot up and down the harbor?

Ans. I am familiar with it. Have been accustomed to pilot all classes of vessels up and down the harbor.

Int. 3. State whether you are familiar with the Cunard steamships and with the "Java" in that line of ships, and whether or not you have had charge of such ships as pilot?

Ans. I am familiar with those ships; I never was pilot of the "Java," but have piloted her sister ships, ships of the same class.

Int. 4. Are you familiar with the location of the school-ship "Geo. M. Barnard" at her winter moorings in the harbor of Boston?

Ans. I am.

Int. 5. Examine the chart now shown you, marked "Mr. Boschke's Plan," and state whether or not the position of said ship and her moorings is correctly laid down there.

Ans. Yes, sir; I think it is.

Int. 6. Are you familiar with the set of the tides at the place where said ship lies?

Ans. I am; it is part of my business to know it.

Int. 7. Suppose the tide to be one hour's ebb at a spring tide, and the wind a three or four knot breeze from the west, how would the school-ship head, at her mooring?

Ans. I think about west-northwest; I should think about as
218 shown on the chart above referred to. The tide there sets down the main channel, not through Bird Island.

Int. 8. (De bene esse.) State if you know whether there is any rule, custom or usage for the Cunard steamers or other steamers entering the harbor of Boston not to go inside the school-ship at her moorings.

(Objected to.)

Ans. I know of no rule or custom to prevent.

Int. 9. (De bene esse.) State what you do know as to the usage or practice of steamers in regard to passing inside the school-ship.

(Objected to.)

Ans. I have been inside with steamers and sailing-ships, also with Cunard steamships. I was never inside with any of the other large ocean boats, for I was never a pilot of many of them, but have been in with the New Orleans boats and other English steamers of a smaller class, such as the steamers from the Provinces, etc. I have frequently seen the steamers of the New York, the Philadelphia and the Baltimore lines go inside of her. Very frequently the Eastern boats go inside.

Int. 10. (De bene esse.) Of what class and draft are the steamers of the New Orleans, New York, Philadelphia and Boston lines?

Ans. From fourteen to nineteen and sometimes twenty feet draft—from eight hundred to fifteen hundred tons.

Int. 11. (De bene esse.) Suppose that you were piloting a steamship like the "Java," drawing nineteen feet, up the harbor, bound for the Cunard dock at East Boston, with the wind from the west, a three or four knot breeze and at one hour's ebb of a spring tide, and that the school-ship were not in the harbor and that there were no obstructions to your course, what would be your ordinary and proper course with reference to the moorings of the school-ship?

(Objected to.)

Ans. The school-ship would be about in the track in which I should go.

Int. 12. (De bene esse.) Suppose the wind and tide as stated in the

eleventh interrogatory, and that the school-ship were lying at her moorings, what would be your proper course in coming up the harbor to the same dock from the Upper Middle, and how would that course be determined?

219 Ans. I should head up for about the centre of the city, say about Commercial wharf, and then be governed by what vessels I should see; which channel I should take would be governed by what vessels there were in the stream. I mean by "which channel," whether I should go inside or outside of the school-ship. I should endeavor to come close alongside of the school-ship with the tide at one-hour ebb, one side or the other of her.

Int. 13. Suppose with wind and tide as stated, that at the Upper Middle you had a clear view between the school-ship and your dock, and that no vessels were there at anchor or sailing, and that you observed vessels at anchor to the westward of the school-ship, what would be the proper course for you to take?

Ans. I should go inside of the school-ship.

Int. 14. Where in your course should you determine, under the circumstances stated in the last interrogatory, whether to go inside or outside the school-ship, and where and how should you change your course in order to go inside if you so determined?

Ans. Well, when I got probably half way from the Upper Middle buoy to the dock, about abreast of Slate Ledge buoy, I should determine which way to go. I wouldn't determine probably to go that way until I got to that point, so that I could determine how the vessels lay. As soon as I determined which way to go, if I was going inside I should port my helm, and steer right along by the school-ship's stern, giving her a clever berth, perhaps fifty or a hundred feet from her, and as soon as I got by the school-ship, should starboard my wheel and go straight for the dock, so as to lay her across the dock.

Int. 15. Suppose with wind and tide as stated in the eleventh interrogatory, you had observed at the Upper Middle a free course between the school-ship and your dock, and that you had brought your ship up the channel to the point marked by the letter C, in the word "Channel" on the chart now shown you and marked "Exhibit A, W. W. jr.," and that you then observed several vessels at anchor to the westward of the school-ship, in the way to your dock if you should go outside of her, would it in your opinion be an unusual or venturesome navigation for you to go inside the school-ship, in the manner stated in your last answer, or how otherwise?

220 Ans. It would not be an unusual or venturesome navigation; I know of no reason why it wouldn't be perfectly proper. It is always a rule with us to go anywhere we see a clear channel, if we have sufficient water.

Int. 16. Under the circumstances stated in the last preceding question, would you or not consider it proper to go outside of the school-ship?

Ans. I should go inside the school-ship by all means, under the circumstances there stated. (Answer objected to, on part of libellants.) I should not consider it proper to go outside the school-ship.

Int. 17. State whether the risk which you would incur by running close by the stern of the school-ship in the manner stated by you, of meeting an unseen boat or vessel coming out from behind the school-ship, is an unusual risk, or how otherwise?

Ans. I should think the risk would be very slight; it is not an unusual risk; the risk of meeting a vessel coming out that the school-ship

would hide would be very slight. Any vessel under way, we would be likely to see her sails, and any vessel at anchor we would be likely to see before on the way up.

Int. 18. How common or uncommon is it for you in piloting steamers up the harbor, to pass by the sterns of ships at anchor in the channel in the manner stated by you?

(Objected to.)

Ans. Very frequently; it is customary always, when we get in among the shipping at anchor to go very close to their sterns; sometimes we are not able to tell which side we will go of a vessel until we are within two or three vessels' lengths of her, the shipping is so close.

Int. 19. Suppose with wind and tide as stated in the eleventh interrogatory, that in passing the stern of the school-ship with a steamer like the "Java," in the manner stated in your fourteenth answer, your engines having stopped, and your speed being reduced to three or four knots, just before your bow came up with the school-ship's stern, you should discover a schooner which had been hidden from view by the school-ship, about abreast the starboard bow of the school-ship, with her foresail partly up and about two lengths off from you, heading down the harbor, a little off from the line of the school-ship, and so that
221 if you continued your course you must come into collision with her, what would it be proper for you to do on board the "Java?"

Ans. I should put my wheel hard to starboard, and turn the engines back; if we put the helm the other way to go the other side of her, it would put the ship too far over. I don't see any other alternative than to put the helm to starboard and turn her back; that would be with a view to going between the schooner and the school-ship; that would be with a view to avoid the collision, if by turning back we could stop her enough to do so.

Int. 20. Would it, in your opinion, upon the facts stated, be practicable to do anything else on board the "Java" to avoid the collision?

Ans. No, sir, it would not.

Int. 21. Upon the facts stated, would it or not be practicable or safe or proper to anchor the "Java," or how otherwise?

Ans. The ship would be going too fast to have anchored; it would have been of no use; it would have parted any chain that they have, with the ship going at that rate of speed.

Int. 22. In estimating the rate of speed, do you allow for the effect of reversing the engines?

Ans. I do; I suppose the minute that we discovered the vessel two lengths off, that we reversed the engines as soon as we could; as soon as they ordinarily would be on board such a ship under those circumstances.

Int. 23. At what rate of speed would it, in your opinion, be safe or proper, under the circumstances, to bring the "Java" to an anchor?

Ans. I never have seen one of those ships brought up going faster than a knot; I think if one of those ships was going over a knot, it would part her chain.

Int. 24. Would you or not deem it proper, under the circumstances stated, to anchor a ship like the "Java," with the expectation that she would drag her anchors for fifty feet?

Ans. I should not.

Int. 25. Would there or not be any other objection to anchoring such a ship, under the circumstances stated, than the liability to part her chain?

Ans. That would be the greatest objection; I don't think it would

222 have been any use, under the circumstances, to have let go the anchor; I don't think I should have done it, if I had had charge of the ship. There would be no other reasons, if the ship had sufficient room to swing, and if there was sufficient water, so that her bottom would not take the anchor.

Int. 26. State whether it is or not usual for vessels to anchor to the westward or northwest of the school-ship's moorings, and how does the number of vessels so anchoring compare with those anchoring to the north and east of the school-ship?

Ans. The proportion is four to one anchoring west of the school-ship; four times as many anchor to the west as to the east.

Cross-examination by L. S. Dabney, esq., of counsel for libellants:

Cross-int. 1. About how many Cunard steamers have you had charge of as pilot?

Ans. I think about fifteen in, and as many out.

Cross-int. 2. How many have you taken inside the school-ship?

Ans. One in and one out is all that I recollect of; one going up, and one down.

Cross-int. 3. When?

Ans. I don't recollect the date; it was either the steamer "Africa" or "Europa." I was pilot of each of them several times; I should think four or five years ago.

Cross-int. 4. How many times have you ever seen Cunard steamers go inside the school-ship?

Ans. Three or four times.

Cross-int. 5. Going up or down the harbor?

Ans. Mostly up.

Cross-int. 6. Do you know how long the "Java" is?

Ans. I do not know her exact length; I think about three hundred and sixty feet.

Cross-int. 7. How long are the New Orleans, New York, Philadelphia, and Eastern steamers?

Ans. Some of the New Orleans steamers are two hundred and ninety or three hundred feet, I should think; the others, I should think,
223 were from two hundred to two hundred and fifty; I don't know that I ever paid any particular attention to their dimensions.

Cross-int. 8. Do you pilot small vessels?

Ans. I do.

Cross-int. 9. Did you ever take them down inside the school-ship?

Ans. Frequently.

Cross-int. 10. When you do, do you expect to meet Cunard steamers there?

Ans. That is something I hardly make any calculation on.

Cross-int. 11. Did you ever meet a Cunard steamer there when you were taking a small vessel down?

Ans. I never did.

Cross-int. 12. Please state why, under the circumstances described in the fifteenth interrogatory, it would not be prudent to go outside of the school-ship?

Ans. Because it would not be convenient to get to the dock. By going outside of the school-ship, you would have to go so far to the westward to get round the vessels that it would not be convenient to get to the dock.

Cross-int. 13. You mean, then, only that it would be inconvenient, and not imprudent or dangerous?

Ans. Not imprudent or dangerous.

Cross-int. 14. Great caution and circumspection should be exercised, should they not, in taking a Cunard steamer inside of the school-ship?

Ans. Well, not any more than is required to be exercised at any time, I shouldn't suppose.

Cross-int. 15. Is not the navigation there rather more difficult than in a place where there is more room?

Ans. Yes, it is more difficult there than a place where there is more room; or, the answer should be, certainly.

Cross-int. 16. Then should it not be undertaken with caution and careful circumspection?

Ans. Yes.

Cross-int. 17. How swift is the current at the school-ship, with a spring tide one hour ebb?

224 Ans. From a knot to a knot and a half.

Cross-int. 18. If a Cunard steamer, approaching the school-ship from the direction of Slate Ledge buoy, at a speed of four knots, with a spring tide one hour ebb, and the wind west, blowing a three or four knot breeze, when within four lengths of the school-ship should stop her engines, what would be her rate of speed when within one length of the school-ship?

Ans. Well, she would have reduced her speed one-quarter, probably; if she was going four knots, she would probably be going about three when she got there.

Cross-int. 19. Have you taken into account that the tide is ebbing?

Ans. I have.

Cross-int. 20. How far would she go after stopping her engines before she came to a stop?

Ans. Half a mile.

Cross-int. 21. Against the tide?

Ans. With the tide there would be there.

Cross-int. 22. Then you think she would be going three knots after moving nearly a quarter of a mile after her engines stopped, and would lose the rest *her* of her way in the next quarter?

Ans. Yes, I think she would.

Cross-int. 23. How fast, under the circumstances indicated in the eighteenth cross-interrogatory, would the steamer be moving over the ground when she reached within one length of the school-ship?

Ans. Well, I should certainly think two knots and a half.

Cross-int. 24. You say that the steamer would be going about three knots three lengths from where her engines are stopped; suppose they should be then reversed, how far would the steamer go before she stopped?

Ans. In about two lengths or two lengths and a half of her, providing that they immediately got her to work turning back.

Cross-int. 25. When she had moved a length after her engines were stopped, would there be any danger in dropping an anchor?

Ans. I think it would part her chain.

Cross-int. 26. I meant to suppose in the last question that she
225 had moved a length after her engines had begun to reverse; would there then be any danger in dropping an anchor?

Ans. No, I think not.

Cross-int. 27. Would there when she had moved half a length after her engines were reversed?

Ans. I think that after she had moved a length would be as soon as an anchor could be let go with safety.

Cross-int. 28. Pilots bringing Cunard steamers up the harbor always see to it that the anchors are in readiness, do they not?

Ans. It is customary for the chief officer to attend to that duty in all Cunard steamers.

Cross-int. 29. Does not the pilot usually ascertain whether this part of the chief officer's duty has been performed?

Ans. We can usually see for ourselves if it is daytime; the anchor is right in sight, and we can look right at it.

Cross-int. 30. How are the anchors carried?

Ans. On the bow; when they let them go, they let them go what we call stock and fluke.

Cross-int. 31. What is the object of having the anchors in readiness?

Ans. To let them go in case they want to use them.

Cross-int. 32. To what pilot-boat do you belong?

Ans. No. 1.

Cross-int. 33. Do you know Captain Elbridge G. Martin?

Ans. I do.

Cross-int. 34. To what boat does he belong?

Ans. No. 1.

Cross-int. 35. Have you heard of the collision between the "Java" and a schooner near the school-ship, two or three years ago?

Ans. I have.

Cross-int. 36. Has it been talked about a good deal among the Boston pilots?

Ans. It has not to my knowledge.

Cross-int. 37. Have you ever heard Captain Martin tell how it happened?

Ans. I do not recollect of ever hearing him tell the story.

Cross-int. 38. Hasn't he talked it over with you?

226 Ans. Yes, he has talked it with me, mentioning the case, but not telling me of the collision that I recollect; the account of how it all happened.

Cross-int. 39. Hasn't he told you how the collision happened?

Ans. I do not recollect of his describing it.

Cross-int. 40. Didn't he tell you that he went inside the school-ship and fell in with a schooner, and what he did then, and why?

Ans. I think he has.

Direct examination resumed:

Int. 27. Was it before or after the collision between the "Java" and the "McCloskey" that you took a Cunarder up inside the school-ship?

Ans. Before.

Int. 28. What liability to inconvenience or danger would there be in taking a long ship like the "Java" to her dock by going up round the vessels lying to the west of the school-ship with an ebb tide and wind to the westward?

(Objected to.)

Ans. It would be very difficult docking, getting the ship to her dock, if there were many vessels to the west of the school-ship.

Int. 29. What would the difficulty arise from?

(Objected to.)

Ans. To get the ship on the right angle, to put her against the tide with her bow against the dock, we should have to go at right angles to the tide in getting her to the dock, and it would be difficult turning her round.

Int. 30. Would there or not be a liability in crossing the tide that

the ship would sag against the vessels around which she would have to pass?

(Objected to.)

Ans. There is always a liability; I don't know that the liability would be more than usual in running across any vessel's bow.

ABEL F. HAYDEN.

227 *Deposition of Maxwell Reed..*

Direct examination by W'm G. Russell, esq., of counsel for respondents:

SEPT. 21, 1869.

Int. 1. What is your name, age, residence, and occupation; and how long have you been engaged in it?

Ans. My name is Maxwell Reed; age forty-two; I reside at East Boston, Mass.; I am a pilot; have been in commission twenty years; Boston harbor; Full Branch, since 1854 I think.

Int. 2. Are you familiar with the harbor of Boston? What classes of vessels have you been accustomed to pilot up and down the harbor?

Ans. I am familiar with it; have piloted vessels of all classes except Cunard screw steamers of the largest class, which I never happened to have; the smaller class of Cunard screw steamers I have piloted, such as the "Tripoli."

Int. 3. Are you familiar with the location of the school-ship at her winter moorings in Boston harbor?

Ans. Yes, sir.

Int. 4. Examine the chart now shown you marked "Mr. Boschke's plan," and state whether or not the position of said ship and her moorings is correctly laid down there.

Ans. Yes, sir; I should say it was very correctly laid down there.

Int. 5. Are you familiar with the set of the tides at the place where said ship lies?

Ans. Yes, sir.

Int. 6. Suppose the tide to be one hour's ebb of a spring tide, and the wind to be west and a three-knot breeze, how would the school-ship head at her moorings?

Ans. Not far from west-northwest; straight up and down; about as she heads on the chart.

Int. 7. How does the tide set at that point at one hour ebb; and is it or not there affected by the tide of Bird Island Channel?

Ans. It sets straight up and down the channel there, I should say; it is not in the least affected by the tide of Bird Island Channel.

228 Int. 8. (De bene esse.) State, if you know, whether there is any rule, custom, or usage for the Cunard steamers or other steamers entering the harbor of Boston not to go inside of the school-ship at her moorings.

(Objected to.)

Ans. There is no rule of any kind that I ever knew; a man must use his own judgment in coming up which side of her to go. There is no usage or custom not to go there.

Int. 9. (De bene esse.) State what you do know as to the usage or practice of steamers in regard to passing inside the school-ship.

(Objected to.)

Ans. The practice is to go in there when the time is suitable and ebb tide. All these large steamers, such as the New York and the Philadelphia steamers, go up inside, as it gives them more room to make

their turn so as to lay up to their wharves; if they go to the other side they have to make a shorter and quicker turn. I have seen these boats go up inside frequently; their berth is generally at Long wharf, or Central wharf. I have seen Cunard steamers come up and go inside of where the school-ship lays, inside of the school-ship. I have been up with the Cunard steamer "Africa" inside of the line of the school-ship's moorings; the school-ship was not there then; I have never brought one up inside of the school-ship itself. The Eastern boats go up inside; in fact, all classes of vessels going up to the south part of the city go up inside, as they get a clearer view up the harbor to make their turn. (The portion of the answer relating to other classes of vessels than the Cunard steamships objected to on part of libellants.)

Int. 10. (De bene esse.) Of what class and draft are the New York and Philadelphia steamers you have spoken of?

Ans. They run all the way from fourteen to eighteen feet draft, nineteen sometimes; somewhere in the vicinity of fourteen hundred tons, I don't know exactly.

Int. 11. (De bene esse.) Suppose that you were piloting a steamship like the "Java," drawing nineteen feet of water, up the harbor, bound for the Cunard dock at East Boston, with the wind from the west, a three or four knot breeze, and at one hour's ebb of a spring tide, and that the school-ship was not in the harbor, and there were no obstructions in your course, what would be your ordinary and proper course with reference to the moorings of the school-ship?

(Objected to.)

229 Ans. I should go as near to the Cunard wharf as I could go; very near in the line of the school-ship, possibly a grain outside of it, but a straight course to the end of Cunard wharf.

Int. 12. (De bene esse.) Suppose the wind and tide as stated in the eleventh interrogatory, and that the school-ship were lying at her moorings; what would be your proper course in coming up the harbor to the same dock, from the Upper Middle, and how would your course be determined?

Ans. I should first see whether it was clear inside the school-ship; I should come up until I could see it was clear in the course I wanted to go; I should head her about for Commercial wharf. After I got up and saw everything was all clear inside the school-ship—say about half way up from the Upper Middle—I should head up inside the school-ship. I should rather go inside the school-ship at that time of tide, if the course was clear, because I could lay my ship to the wharf a good deal easier and safer going that way.

Int. 13. Suppose, with the wind and tide as stated, you had at the Upper Middle a clear view between the school-ship and your dock, and that no vessels were there at anchor or sailing, and that you observed vessels at anchor to the westward of the school-ship, what would be your proper course to your dock?

Ans. Inside the school ship.

Int. 14. Where in your course should you determine, under the circumstances stated, whether to go outside or inside, and where and how should you change your course so as to go inside, if you so determined?

Ans. I should change my course about abreast the Slate Ledge buoy. I should make up my mind about there whether to go inside or outside. If I decided to go inside, I should put my helm to port so as to just go by the school-ship's stern, and lay my course straight for the wharf, if it was all clear there. [It is decidedly the safest course at that time of tide.]

Part in brackets objected to.

Int. 15. Suppose, with wind and tide as stated in the eleventh interrogatory, you had observed at the Upper Middle a free course between the school-ship and your dock, and that you had brought your
230 ship up the channel to the point marked by the letter C in the word "Channel" on the chart now shown you and marked "Exhibit A, W. W., jr.," and that you then observed several vessels at anchor to the westward of the school-ship in the way to your dock if you should go outside of her, would it in your opinion be an unusual or venturesome navigation for you to go inside the school-ship in the manner stated in your last answer, or how otherwise?

Ans. No, sir; I should certainly take that course.

Int. 16. Under the circumstances stated in the last preceding question, would you or not consider it proper to go outside the school-ship?

Ans. No, sir, I should not think it proper; vessels to the westward are very much in your way in making your turn, you are very apt to drift down upon them.

Int. 17. State whether the risk which you would incur by running close by the stern of the school-ship in the manner stated by you, of meeting an unseen boat or vessel coming out from behind the school-ship is an unusual risk, or how otherwise?

Ans. No, sir, it is no unusual risk; you are liable to meet ships any time, going up and down the harbor; it is a risk we have to take in going close to the sterns of vessels; [a vessel may pop out at any time, without our seeing it before, and it be almost impossible to keep clear of her, but we have to run the risk of that.] (Part in brackets objected to, on part of libellants.) There wouldn't be so much danger if a vessel were under sail coming down, and had control of herself.

Int. 18. Suppose, with wind and tide as stated in the eleventh interrogatory, that in passing the stern of the school-ship with a steamer like the "Java," in the manner stated in your fourteenth answer, your engines having stopped, and your speed being reduced to three or four knots, just before your bow came up with the school-ship's stern, you should discover a schooner which had been hidden from view by the school-ship, about abreast the starboard bow of the school-ship, with her foresail partly up and about two lengths off from you, heading down the harbor a little off from the line of the school-ship, and so that if you continued your course you must come in collision with her, what would it be proper for you to do on board the "Java?"

Ans. In that case I should starboard my helm, and sheer in
231 towards the school-ship; should try to get between the school-ship and the vessel. I should, if I found I was getting too close, give my orders to turn the engines back; on the case stated I should give the order to reverse the engines. I should give the order to starboard.

Int. 19. Would it, in your opinion, upon the facts stated, be practicable to do anything else on board the "Java," to avoid the collision?

Ans. No, sir.

Int. 20. Upon the facts stated, would it or not be practicable or safe or proper to anchor the "Java," or how otherwise?

Ans. No, sir, it would not be safe to anchor her, under the circumstances; it would be apt to part the chain or carry away something, with a steamer of that size, and if you should let go the anchor and run out much chain she might swing so as to touch.

Int. 21. Would you, or not, deem it proper, under the circumstances stated, to anchor a ship like the "Java" with the expectation that she would drag her anchors for fifty feet?

Ans. No, sir. If I should let go the anchor with the expectation of dragging fifty feet, she would probably part the chain; I don't think she would drag it fifty feet.

Int. 22. State whether it is or not usual for vessels to anchor to the westward or northwest of the school-ship's moorings, and how does the number of vessels so anchoring compare with those anchoring to the north and east of the school-ship?

Ans. It is usual for vessels to anchor to the northward and westward of the school-ship; very few vessels anchor to the northward and eastward of the school-ship; they generally try to get up to the westward or northward and westward of it.

Cross-examination by L. S. Dabney, esq., of counsel for libellants:

Cross-int. 1. Do you know the length and tonnage of the "Java?" If yes, please state them as nearly as you can.

Ans. I do not know the exact length—she is three hundred and fifty feet or somewhere about there. Her tonnage, I suppose, is somewhere in the vicinity of two thousand.

232 Cross-int. 2. How many of the Cunard steamers are of so large a class?

Ans. I don't know how many there are—there are four or five of them.

Cross-int. 3. (De bene esse.) The New York, Philadelphia and Eastern steamers are very much shorter, are they not, and smaller?

Ans. Yes, sir, they are shorter, some, and rather smaller.

Cross-int. 4. Is it not uncommon for a ship so large as the "Java" to go inside the school-ship?

Ans. No, sir, it is not uncommon.

Cross-int. 5. Did you ever take one there?

Ans. No, sir, not one of that class; I have seen them go there several times.

Cross-int. 6. Did you ever see one there?

Ans. Yes, sir.

Cross-int. 7. How many times?

Ans. I couldn't state the exact number of times; I have seen them a number of times.

Cross-int. 8. State about how many times.

Ans. Probably I have seen four or five of them, more or less; very likely more.

Cross-int. 9. What ships were they?

Ans. I couldn't tell their names; it's a matter I shouldn't be likely to keep in mind.

Cross-int. 10. What kind of ships were they, and when did you see them go there?

Ans. Large ships I have seen go there; the time I couldn't say; I have seen them a number of times.

Cross-int. 11. Has it been within two years?

Ans. Yes, sir, I think I have seen them go inside within two years; in fact, I am almost positive.

Cross-int. 12. Did you ever see one go there more than two years ago; I mean one as large as the "Java?"

Ans. Quite likely I have.

Cross-int. 13. Do they not usually go outside of the school-ship?

233 Ans. They go when the tide serves them, and it is proper for them to go there; if it is proper to go inside, they go; a man has to use his own judgment there.

Cross-int. 14. Is it not almost always the case that it is proper to go

outside with them, and do they not, as a matter of fact, almost always go outside?

Ans. They go outside on the flood tide; they don't go outside with tide two hours' ebb; a man must go where he can dock his ship easiest and safest. They do not almost always go outside.

Cross-int. 15. Have you observed these ships so large as the "Java" coming up the harbor or going down, or are you answering my questions only on theory?

Ans. I have observed them a great number of times.

Cross-int. 16. How many times, about, have you seen them pass outside of the school-ship?

Ans. As a general thing they pass outside going down; in coming up I couldn't state the number of times I have seen them. I have seen them come up and go down outside, but I don't know as I ever saw them go down inside.

Cross-int. 17. Is it not much more common for them to pass outside than inside?

Ans. Well, yes, sir; it is.

Cross-int. 18. When you took the "Africa" inside, was the school-ship at her moorings?

Ans. No, sir; there was no school-ship at that time.

Cross-int. 19. When you have seen Cunard steamers inside, as you say, has the school-ship been at her moorings?

Ans. I have seen her at her moorings when I have seen them.

Cross int. 20. How often?

Ans. That I couldn't say. I have seen her there once. I won't be positive it was more than once.

Cross-int. 21. You say if there were vessels at anchor to the north and west of the school-ship, you would not consider it proper to take a ship like the "Java" outside of them with a spring tide one hour ebb and the wind west, blowing a three-knot breeze, because you might sag down on them; suppose you knew that a tug was waiting to take
234 you to your dock at East Boston, would you still consider it not prudent to go outside?

Ans. Yes, sir; I should take ust the same course inside the school-ship.

Cross-int. 22. Is the risk of sagging down on vessels going across their bows greater or smaller than the risk of meeting an unseen vessel coming out from behind another across the stern of which you are passing?

Ans. The risk is greater of drifting down across the vessels.

Cross-int. 23. I mean, is there more danger that you would drift down than that you would meet one?

Ans. Yes, sir; I think there is more danger.

Cross-int. 24. You frequently are obliged to go across the bows of vessels, are you not?

Ans. Yes, sir; as a general thing, if we can cross a vessel's stern we do it.

Cross-int. 25. Why could you not take your ship far enough away from vessels at anchor to the north and west of the school-ship to avoid all danger of sagging down on them?

Ans. We have to go so far up to dock your ship; you have to go almost as far as the ferry-ship, and then drop the ship gradually down.

Cross-int. 26. Well, it could be done, couldn't it?

Ans. Yes, sir, it could be done; but it is very close work, and dangerous.

Cross-int. 27. Then all you mean is that it is less convenient?

Ans. Yes, sir.

Cross-int. 28. Do you consider it prudent to take a vessel to a place where, if it became necessary to bring her to a stop, it would be unsafe to anchor?

Ans. I hardly know how to answer that; I shouldn't consider it pruden to take her to such a place where it would be unsafe to anchor; if you have to go there to get your vessel into position, of course you have to go there at times.

Cross-int. 29. How swift is the current at the school-ship with a spring tide one hour ebb?

235 Ans. Somewhere about three miles an hour; it isn't so much at one hour ebb, it is about two or two and a half.

Cross-int. 30. If a Cunard steamer, approaching the school-ship from the direction of Slate Ledge buoy at a speed of four knots, with a spring tide one hour ebb, and the wind west, blowing a three or four knot breeze, when within four lengths of the school-ship should stop her engines, what would be her rate of speed when within one length of the school-ship?

Ans. About one-quarter, about a knot and a half, I should think; she would be going about that when she got to the school-ship.

Cross-int. 31. Suppose when she had arrived within one length of the school-ship her engines should be reversed, how far would she go before she came to a stop?

Ans. She probably might go a length.

Cross-int. 32. Would it be unsafe to drop an anchor when the engine begins to reverse?

Ans. If the ship was going ahead, it would.

Cross-int. 33. In the case supposed, would the ship be going ahead enough to make it unsafe?

Ans. Yes, sir; she would be.

Cross-int. 34. Is it unsafe to drop an anchor with a ship like the "Java" if she is moving ahead at all?

Ans. Yes, sir; it is. The ship is heavy and is liable to part her chain.

Cross-int. 35. To what pilot-boat do you belong?

Ans. No. 2.

Cross-int. 36. Do you know Captain Elbridge G. Martin?

Ans. Yes, sir.

Cross int. 37. Have you heard that he took the "Java" inside the school-ship about three years ago, and ran down a schooner there?

Ans. Yes, sir; I heard it I believe.

Cross-int. 38. Have you heard him tell how it happened?

Ans. No, sir; I don't know that I ever heard him tell the whole circumstances; I have heard him speak about it.

Cross-int. 39. You have heard him say how he came to go there, haven't you?

236 Ans. Yes, sir.

Cross-int. 40. And what he did when he saw the schooner?

Ans. No, sir; I never heard what he did when he saw the schooner.

Cross-int. 41. Have you heard the matter talked about by other pilots?

Ans. I have heard it mentioned by other pilots—have never discussed it with any of them.

Cross-int. 42. It has been more or less talked about, hasn't it?

Ans. I suppose it has—I haven't talked about it any myself—once in a while I might have spoken about it. I testified and so did other pilots at the trial of this case in the district court, and so did Captain Martin.

Cross-int. 43. Did you hear Captain Martin testify at that trial?

Ans. No, sir; I did not. I got through before he came on to the stand. I refer to Captain Elbridge G. Martin.

Cross-int. 44. You heard all about the circumstances of the case then, didn't you?

Ans. Yes, sir.

MAXWELL REED.

Deposition of Samuel C. Martin.

Direct examination by W'm G. Russell, esq., of counsel for respondents:

SEPT. 21, 1869.

Int. 1. What is your name, age, residence and occupation, and how long have you been engaged in it, and are you a relative of Elbridge G. Martin?

Ans. My name is Samuel C. Martin, age fifty-two, residence Boston, Mass. I am a Boston pilot; I am a brother of Elbridge G. Martin; have been in service twenty-two years; have had a full branch twenty years.

Int. 2. Are you or not familiar with the harbor of Boston; what classes of vessels have you been accustomed to pilot up and down the harbor?

Ans. I am familiar with it; have been accustomed to pilot vessels of all classes.

Int. 3. State whether you are familiar with the Cunard steam-
237 ships, and with the "Java" in that line of ships, and whether or not you have had charge of such ships as pilot.

Ans. I am familiar with them; have piloted all classes of Cunard steamers, sidewheel and screw, in and out; have not had the "Java," but have had the "Cuba" and "China," sister ships.

Int. 4. Are you familiar with the location of the school-ship, "Geo. M. Barnard," at her winter moorings in the harbor of Boston?

Ans. I am.

Int. 5. Examine the chart now shown you, marked "Mr. Boschke's plan," and state whether or not the position of said ship and her moorings is correctly laid down there.

Ans. I think they are.

Int. 6. Are you familiar with the set of the tides at the place where said ship lies?

Ans. Yes, sir.

Int. 7. Suppose the tide to be one hour's ebb at a spring tide, and the wind a three or four knot breeze from the west, how would the school-ship head at her moorings?

Ans. I should think she would head about northwest by west by compass; the tide there sets down channel, very much as the school-ship is marked on the chart; it is not affected there by the Bird Island channel tide, which is a separate tide.

Int. 8. (De bene esse.) State, if you know, whether there is any rule, custom, or usage for the Cunard steamers or other steamers entering the harbor of Boston not to go inside the school-ship at her moorings.

(Objected to.)

Ans. I don't know of any such rule, custom, or practice; there is no such.

Int. 9. (De bene esse.) State what you do know as to the usage or practice of steamers, in regard to passing inside the school-ship.

(Objected to.)

Ans. I have been there in that track with two of them myself; the

sidewheel steamer "Canada," and the screw "Cuba." I believe the school-ship was not there when I went with the "Canada;" it was some years ago. I went up inside the school-ship with the "Cuba," some four or five years ago, coming up; I can't fix the time, it was some
238 years ago. I have been up with sailing ships; I can call to mind two ships, each of which drew eighteen feet of water. I have seen Cunarders going up that way often, and have seen New York and New Orleans, Philadelphia, and Baltimore steamers going up that way; I cannot say that they make a common practice of going that way, but I have seen them; I am not always there to see them.

Int. 10. (De bene esse.) Of what class and draft are the steamers of the New Orleans, New York, Philadelphia, and Boston lines?

Ans. They draw all the way from fourteen to eighteen feet; I suppose their tonnage is from eight hundred to fifteen hundred.

Int. 11. (De bene esse.) Suppose that you were piloting a steamship like the "Java," drawing nineteen feet, up the harbor, bound for the Cunard dock at East Boston, with the wind from the west, a three or four knot breeze, and at one hour's ebb of a spring tide, and that the school-ship were not in the harbor, and that there were no obstructions to your course, what would be your ordinary and proper course, with reference to the moorings of the school-ship?

(Objected to.)

Ans. I should pass about where the school-ship is, on the chart.

Int. 12. (De bene esse.) Suppose the wind and tide as stated in the eleventh interrogatory, and that the school-ship were lying at her moorings, what would be your proper course in coming up the harbor to the same dock from the Upper Middle, and how would that course be determined?

Ans. After I got above the Upper Middle, I should steer as near as I can tell you, for Commercial Wharf dock; when I got up near the Slate Ledge buoy, if I were going inside, I should port my helm to pass within a hundred feet of the school-ship, straight for Cunard wharf. I should be governed by the vessels as they lay there at anchor; if I saw a clear place to go inside, I should go there, straight for the Cunard wharf.

Int. 13. Suppose, with wind and tide as stated, that at the Upper Middle you had a clear view between the school-ship and your dock, and that no vessels were there at anchor or sailing, and that you observed vessels at anchor to the westward of the school-ship, what would be the proper course for you to take?

239 Ans. I should go inside the school-ship, leaving her on the port hand.

Int. 14. Where in your course should you determine, under the circumstances stated in the last interrogatory, whether to go inside or outside the school-ship, and where and how should you change your course in order to go inside, if you so determined?

Ans. After I had passed the Upper Middle, about half way to the Slate Ledge buoy, I should determine, and I should port my helm there to inside, or I could do it after I got full up to the Slate Ledge buoy, there would be nothing to prevent my changing my course there. I should change it by porting my helm to pass the school-ship on the port hand within one hundred feet of it.

Int. 15. Suppose, with wind and tide as stated in the eleventh interrogatory, you had observed at the Upper Middle a free course between the school-ship and your dock, and that you had brought your ship up the channel to the point marked by the letter C in the word "Channel"

on the chart now shown you, and marked "Exhibit A, W. W., Jr.," and that you then observed several vessels at anchor to the westward of the school-ship, in the way to your dock if you should go outside of her, would it in your opinion be an unusual or venturesome navigation for you to go inside the school-ship in the manner stated in your last answer, or how otherwise?

Ans. No, sir; it would not be unusual or venturesome, no more so than the other side; it would be the proper course to pursue.

Int. 16. Under the circumstances stated in the last preceding question, would you or not consider it proper to go outside of the school-ship?

Ans. It would not be so well to make the dock, the landing at the dock, to go outside.

Int. 17. State whether the risk which you would incur by running close by the stern of the school-ship, in the manner stated by you, of meeting an unseen boat or vessel coming out from behind the school-ship, is an unusual risk or how otherwise?

Ans. There is nothing unusual there, you are liable to meet the vessels in that way in any part of the harbor.

Int. 18. How common or uncommon is it for you, in piloting
240 steamers up the harbor, to pass by the sterns of ships at anchor in the channel in the manner stated by you.

(Objected to.)

Ans. We often pass as close to the sterns of ships, probably six times in eight coming up the harbor.

Int. 19. Suppose, with wind and tide as stated in the eleventh interrogatory, that in passing the stern of the school-ship with a steamer like the "Java" in the manner stated in your fourteenth answer, your engines having stopped, and your speed being reduced to three or four knots, just before your bow came up with the school-ship's stern, you should discover a schooner which had been hidden from view by the school-ship, about abreast the starboard bow of the school-ship, with her foresail partly up, and about two lengths off from you, heading down the harbor a little off from the line of the school-ship, and so that if you continued your course you must come into collision with her, what would it be proper for you to do on board the "Java?"

Ans. I should reverse the engine and put my helm to starboard, to stop the speed of the ship, and sheer to port, so as to go across the schooner's stern between her and the school-ship.

Int. 20. Would it, in your opinion, upon the facts stated, be practicable to do anything else on board the "Java" to avoid the collision?

Ans. It would not.

Int. 21. Upon the facts stated, would it or not be practicable or safe or proper to anchor the "Java," or how otherwise?

Ans. I don't think it would be proper or safe to let go the anchor.

Int. 22. Why not?

Ans. It would be liable to part the chain; I think it would part it. If I gave her chain and checked her, I should strike the school-ship to port or the schooner to starboard. If I stop the ship with the chain without its parting, the ship must slew to one side or the other; my opinion is, the chain would have parted had the anchor been let go.

Int. 23. Would you, or not, deem it proper, under the circumstances stated, to anchor a ship like the "Java" with the expectation that she would drag her anchors for fifty feet?

Ans. No, sir, I would not.

Int. 24. State whether it is or not usual for vessels to anchor

241 to the westward or northwest of the school-ship's moorings, and how does the number of vessels so anchoring compare with those anchoring to the north and east of the school-ship?

Ans. There are many more anchor to the westward.

Cross-examination by L. S. Dabney, esq., of counsel for libellants:

Cross-int. 1. I understand you to say you are a brother of Captain E. G. Martin?

Ans. Yes.

Cross-int. 2. Did you ever anchor one of the Cunard steamers?

Ans. Yes.

Cross-int. 3. Which one of them?

Ans. The "Europa," I think—it was a side-wheel steamer.

Cross-int. 4. Under what circumstances?

Ans. It was in the night, and we couldn't reach the dock.

Cross-int. 5. Did you ever anchor one at any other time?

Ans. Yes.

Cross-int. 6. Under what circumstances?

Ans. We anchored in the night, in a snow-storm, in Light-house channel; that was a screw steamer.

Cross-int. 7. Did you ever anchor any other?

Ans. I don't recollect that I ever did, any Cunarder.

Cross-int. 8. Is it practicable or safe to anchor the "Cuba" or "Java" when they are moving ahead?

Ans. No, sir.

Cross-int. 9. At no rate of speed at all?

Ans. If there is no rate of speed she isn't moving ahead; at no rate of speed it would be practicable to anchor her.

Cross-int. 10. Could you not anchor them without parting the chain when they were going two knots?

Ans. I should be fearful of parting the chain if we were going two knots.

Cross-int. 11. Suppose they were going less than two knots?

Ans. If I had room to give them chain, forty or fifty fathoms, I might bring them up without parting the chain, but they are very heavy
242 vessels, and it takes time to stop them; large bodies move slow, and they strike heavily, and bring up hard.

Cross-int. 12. Suppose they were going less than two knots with engines at a stand, could you not reverse the engines and drop an anchor, without parting the chain?

Ans. That's according to how much chain I was going to use; if I had room to use chain, I might do so.

Cross-int. 13. What do they carry their anchors in readiness for coming up the harbor?

Ans. To be used.

Cross int. 14. To stop them?

Ans. No, sir; never use an anchor to stop them.

Cross-int. 15. Did you never hear of such a thing as using an anchor for such a purpose?

Ans. I don't recollect ever I did.

Cross-int. 16. Do you mean to say you never heard of using an anchor to stop a vessel?

Ans. No, I don't mean to say that; I supposed that question was asked me in reference to that Cunard steamer; now this question includes sailing vessels as well as steam.

Cross-int. 17. Then all you mean to say is, that you never heard that either the "Java" or "Cuba" had been stopped by dropping an anchor?

Ans. Yes.

Cross-int. 18. Has any one ever asked you about stopping the "Java" or "Cuba" that way?

Ans. No, sir; I can't say that they have.

Cross-int. 19. You heard of the "Java's" running down a schooner inside the school-ship, did you not?

Ans. Yes, sir.

Cross-int. 20. And testified at the trial in the district court?

Ans. Yes, sir.

Cross-int. 21. You are familiar, then, with the circumstances of that case?

Ans. I was there at the trial, and heard them there.

Cross-int. 22. When you said, then, in answer to the twenty-second direct interrogatory, "my opinion is the chain would have parted,
243 had the anchor been let go," you were thinking of the case of the "Java," were you not?

Ans. I was thinking of the "Java," when you asked me in reference to the letting the anchor go; I don't know what the number of the question is. (Upon the twenty-second question and answer being repeated, the witness says,) Yes, sir.

Cross-int. 23. Is it not uncommon for vessels so large as the "Cuba" or "Java" to go inside the school-ship?

Ans. No, sir; it is not.

Cross-int. 24. How many vessels so long and large as the "Java" did you ever see go inside of her, when she lay at her moorings?

Ans. I don't know as I can tell the number; I have seen vessels go there, steamers and sailing vessels.

Cross-int. 25. About how many?

Ans. I don't know, sir; that's a hard question to answer, how many for the past twenty years; I have seen many.

Cross-int. 26. How many Cunard steamers?

Ans. I have been there with two myself, and have seen perhaps a dozen more. I don't mean since the school-ship lay there. I have never seen but the two that I went there with, go inside when the school-ship lay there. [I don't see one-quarter part of the Cunarders that come up.]

(Objected to, as not responsive.)

Cross-int. 27. Did you understand my twenty-fifth question to refer only to vessels going there when the school-ship was at her moorings?

Ans. No.

Cross-int. 28. About how many times have you seen ships so large as the "Java" go there when the school-ship was at her moorings?

Ans. Only one, that's the one I was in myself.

Cross-int. 29. Is it not uncommon for ships as large as the "Java" to go inside the school-ship when she is at her moorings?

Ans. I don't know it to be uncommon; I should go there at any such time with the ship as same as the "Java."

Cross-int. 30. How long has the school-ship been there?

Ans. I don't know—I should think about nine years.

Cross-int. 31. Then, if during that time you have only taken one
244 there yourself and only seen one go there while the school-ship was at her moorings, must it not be uncommon?

Ans. I don't know that it's uncommon; it's a common road, which I consider I have a right to go as much as any other part of the harbor.

Cross-int. 32. Do you allow that it is unusual?

Ans. No, sir.

Cross-int. 33. (De bene esse.) The "Java" and "Cuba" are considerably longer and larger, are they not, than the New York, Philadelphia, and New Orleans steamers that you mentioned as going inside the school-ship?

Ans. I suppose they may be longer, I don't know how much longer.

Cross-int. 34. Under the circumstances stated in the sixteenth direct interrogatory, would there be any other objection than you have stated to going outside the school-ship, namely, that it would be less convenient for getting to your dock?

Ans. No.

Cross-int. 35. What pilot-boat do you belong to?

Ans. No. 2.

Cross-int. 36. Have you heard your brother tell about the collision between the "Java" and the schooner?

Ans. Yes.

Cross-int. 37. Has he told you how he came to be inside the school-ship?

Ans. I don't recollect that he did.

Cross-int. 38. Did he tell you what he did to avoid the collision?

Ans. I think he did at the time—it was on the day the collision took place.

Cross-int. 39. Has the matter been talked over between you at all?

Ans. Nothing in regard to the particulars of the collision, except on the first day he told me the collision had taken place. He asked me to be at court and here as evidence, and to see Mr. Russell.

Cross-int. 40. And told you something of the particulars, didn't he?

Ans. He did on the day it took place; I couldn't state what he said.

Cross-int. 41. Have you ever talked about the matter with other pilots, or heard them talk about it?

245 Ans. No, sir; I have not.

Cross-int. 42. How swift is the current at the school-ship, with the tide one hour ebb?

Ans. It may be a knot and a half.

Cross-int. 43. If a Cunard steamer approaching the school-ship from the direction of Slate Ledge buoy, at a speed of four knots, with a spring tide one hour ebb, and the wind west, blowing a three or four knot breeze, when within four lengths of the school-ship, should stop her engines, what would be her rate of speed when within one length of the school-ship?

Ans. I should think it would be three knots.

Cross-int. 44. Suppose you should then reverse the engines, how far would she go before she stopped?

Ans. I should think in reversing her engines at full speed, by the time she stopped she would have made three times her length.

Cross-int. 45. What do you call her length?

Ans. Three hundred and forty-five feet.

Cross-int. 46. What would be her rate of speed when she had gone her length after her engines are reversed at full speed?

Ans. I couldn't tell; I should judge it might be a knot and a half; I never practised it.

SAMUEL C. MARTIN.

Deposition of John T. Gardner.

Direct-examination by W'm G. Russell, esq., of counsel for respondents.

FEB. 9, 1870.

Int. 1. What is your name, age, residence, and occupation, and how long have you been engaged in it?

Ans. My name is John T. Gardner; age, fifty-four; residence, Boston. Mass. I am now harbor master of the city of Boston, have been that for ten years; previous to that I was sixteen years a pilot of the port of Boston.

Int. 2. Are you, or not, familiar with the harbor of Boston? What classes of vessels have you been accustomed to pilot up and down that harbor?

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Ans. I am familiar with the harbor of Boston, and am acquainted with and have handled all classes of vessels.

Int. 3. State whether you are familiar with the Cunard steamships and with the steamship "Java" of that line, and whether you have had charge of any of said ships as pilot.

Ans. I have had charge of a number of them as pilot, probably had a large share of them when I was pilot.

Int. 4. Are you familiar with the location of the school-ship "George M. Barnard" at her winter moorings in the harbor of Boston?

Ans. I am. I placed her where she is myself, being harbor master, and it being my business as such to regulate the anchorage of vessels in the harbor?

Int. 5. Examine the chart now shown you, marked "Mr. Boschke's plan," and state whether or not the position of said ship and her moorings is correctly laid down there.

Ans. I should think that was as near as I could place it myself, probably more accurate, as it was done by measurement.

Int. 6. Are you familiar with the set of the tides at the place where said ship lies?

Ans. I am.

Int. 7. Suppose the tide to be one hour ebb at a spring tide, and the wind a three or four knot breeze from the west, how would the school-ship head at her moorings?

Ans. About the same as she does on this chart marked "Boschke's plan." She heads on that about northwest by west, and that is as near I think as I could put her.

Int. 8. (De bene esse.) State, if you know, whether there is any rule, custom, or usage for the Cunard steamers or other steamers entering the harbor of Boston not to go inside the school-ship at her moorings.

(Objected to.)

Ans. No reason whatever why they should not go in there, when there is water enough; the pilots are all governed by their own judgment. There is no such rule, or custom, or practice; all pilots are supposed to be governed by their own judgment.

Int. 9. (De bene esse.) State what you do know as to the usage or practice of steamers, in regard to passing inside the school-ship.

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(Objected to.)

Ans. The Eastern steamers go inside, I should say eight out of ten of them; the large steamers are governed by the tide, whether it ebbs or flows. I have seen a great many of the New York, New Orleans,

Baltimore, and Philadelphia steamers go inside, and as many outside; they are governed by their chances of making their docks.

Int. 10. (De bene esse.) Of what class and draft are the steamers of the New Orleans, New York, Philadelphia, and Baltimore lines?

(Objected to.)

Ans. I should think they would run all the way from twelve to nineteen feet draft; I should think they would be from twelve hundred to two thousand tons.

Int. 11. (De bene esse.) Suppose that you were piloting a steamship like the "Java," drawing nineteen feet, up the harbor, bound for the Cunard docks at East Boston, with the wind from the west a three or four knot breeze, and at one hour ebb of a spring tide, and that the school-ship were not in the harbor, and that there were no obstructions to your course, what would be your ordinary and proper course, with reference to the moorings of the school-ship?

(Objected to.)

Ans. I should think I would come as near where the school-ship lays as I could come; make a straight course for the dock of the steamship.

Int. 12. (De bene esse.) Suppose the wind and tide as stated in the eleventh interrogatory, and that the school-ship were lying at her moorings, what would be your proper course in coming up the harbor to the same dock from the Upper Middle; and how would the course be determined?

Ans. I should be governed by the state of vessels that lay at anchor on the north side of the channel or harbor. I should come two-thirds or three-quarters of the way up to her, before I should determine my course, unless I saw a clear course before that; say about opposite the Slate Ledge buoy. I should go inside if there were many vessels in my course outside, or outside if there were many inside. If I found I was
248 on the south side, as I should be if I took the ordinary course, I should port my helm to go inside of her, in case I found there were vessels on the other side. I should calculate to run as near her stern as possible, say within fifty feet, and after I passed her I should keep straight for the steamship dock, keeping it on my starboard bow.

Int. 13. Suppose, with wind and tide as stated, that at the Upper Middle you had a clear view between the school-ship and your dock, and that no vessels were there at anchor, or sailing, and that you observed vessels at anchor to the westward of the school-ship, what would be the proper course for you to take?

Ans. I should go inside, under those circumstances.

Int. 14. Where in your course should you determine, under the circumstances stated in the last interrogatory, whether to go inside or outside of the school-ship, and where and how should you change your course, in order to go inside if you so determined?

Ans. Just as soon as I saw the course clear, after I had left the Upper Middle. You can't generally tell whether the course is clear, or how the vessels are anchored, until you get two-thirds of the way up to the school-ship, from the Upper Middle.

Int. 15. Suppose, with wind and tide as stated in the eleventh interrogatory, you had observed at the Upper Middle a free course between the school-ship and your dock, and that you had brought your ship up the channel to the point marked by the letter C in the word channel on the chart now shown you marked "A. W. W. Jr.," and that you then observed several vessels at anchor to the westward of the school-ship, in the way to your dock, if you should go outside of her, would it, in your opinion, be an unusual or venturesome navigation, for you to go

inside of the school-ship in the manner stated in your thirteenth answer, or how otherwise?

Ans. No, sir, that is what I should do certainly, because it leaves the course clear to go inside of the school-ship where there is plenty of water, and it could be safely done.

Int. 16. Under the circumstances stated in the last preceding question, would you or not consider it proper to go outside the school-ship?

Ans. I should not; where there were so many vessels, I should not think it justifiable to go that way, on account of the danger of collision.

249 Int. 17. State whether the risk which you would incur by running close by the stern of the school-ship, in the manner stated by you, of meeting an unseen boat or vessel coming out from behind the school-ship is an unusual risk, or how otherwise.

Ans. Not at all an unusual risk; you can always see vessels at anchor by their masts or, if under way, by their canvas; if there were small vessels at anchor behind the school-ship, you would expect to find plenty of room to go inside of the school-ship, and go clear of them—one side or the other of them. This is the case with the ebb tide, because you can have a chance to sheer your vessel one way or the other without danger, if the vessels are at anchor.

Int. 18. How common or uncommon is it for you in piloting steamers up this harbor with an ebb tide to pass by the sterns of ships at anchor in the channel in the manner stated by you?

(Objected to.)

Ans. It's frequently the case that we have to go by vessels in that way; it's a very usual occurrence, because there being so many vessels at anchor we have to govern ourselves by where we see the clearest course.

Int. 19. Suppose, with wind and tide as stated in the eleventh interrogatory, that in passing the stern of the school-ship with a steamer like the "Java," in the manner stated in your thirteenth answer, your engines having stopped, and your speed being reduced to three or four knots, just before your bow came up with the school-ship's stern, you should discover a schooner, which had been hidden from view by the school-ship, about abreast the starboard bow of the school-ship, with her foresail partly up, and about two or three lengths off from you, heading down the harbor, a little off from the line of the school-ship, and so that if you continued your course you must come into collision with her, what would be the proper course for you to pursue?

Ans. I should stop my engines and reverse them as soon as possible, and put my helm to starboard to try and go between her and the school-ship.

Int. 20. Would it, in your opinion, upon the facts stated, be practicable to do anything else on board the "Java" to avoid the collision?

Ans. I should think certainly it would be the best thing that
250 could be done. It is the only practicable way, to stop your engines and reverse them as soon as you can. [To talk about anchoring under such circumstances is all folly, in my judgment, the vessels being so close together.] (The portion in brackets objected to by counsel for the schooner "McCloskey" as not responsive.)

Int. 21. Upon the facts stated, would it or not be practicable, or safe, or proper to anchor the "Java," or how otherwise?

Ans. I should think not; I should think it was folly to do so; it might cause great damage by parting the chain and, where you were in such close proximity to the two vessels, sheering you into them.

Int. 22. Would you, or not, deem it proper under the circumstances stated to anchor a ship like the "Java" with the expectation that she would drag her anchors fifty feet?

Ans. Under those circumstances I don't think you could get the anchor down so that it would hold her; you wouldn't have the time. It would not be practicable in my judgment. If she was going to drag her anchor, I don't see any use in letting it go; if you expect to get anything out to hold her, you expect or hope it will hold her.

Int. 23. State whether it is or not usual for vessels to lie at anchor to the west and northwest of the school-ship's moorings, and how does the number of vessels so anchoring compare with those anchoring to the north and east of the school-ship?

(Objected to.)

Ans. They are mostly to the westward of her, nine out of ten; they seldom anchor below or to the eastward of her, unless it is all full up above to the westward.

Int. 24. Where does the line for anchorage run with regard to the school-ship?

(Objected to.)

Ans. The permitted line of anchorage runs outside of the school-ship, just on the northerly edge of the little round shoal, till it meets a line drawn straight out from the Cunard steamship wharf, starting from the point marked "J. T. G." on the chart marked "A, W. W., Jr."

(Objected to.)

Int. 25. When did you first know of the collision between the steamer "Java" and the schooner "McCloskey?"

251 Ans. I should think it was an hour after it happened. I was at dinner at time of the collision.

Int. 26. Did you notice and do you now recollect anything about the vessels at anchor in the vicinity of the school-ship at the time of the collision?

(Objected to.)

Ans. It has rather slipped my memory now, but if I recollect right it was four or five or six vessels that lay to the westward of the school-ship; I think I so testified before. I have now in my mind a barque and a brig, or two barques and a brig, and I think there were four or five vessels.

Int. 27. At what time of day did you go to dinner?

Ans. I think I went a little after twelve o'clock.

Int. 28. Were or were not the vessels you have spoken of at anchor to the westward of the school-ship when you went to dinner?

(Objected to, as leading.)

Ans. They were.

Int. 29. Did you or not see them after your return from dinner?

(Objected to, as leading.)

Ans. I did.

Int. 30. Would or not those vessels, as they then lay, obstruct the steamer "Java," in coming up to her dock, if she passed outside of the school-ship?

Ans. They would certainly be in her way, coming up the north side of the channel. Vessels coming up the north side of the channel might go either outside or inside of the school-ship; coming up the south side of the channel they would go to the south of the vessels. A steamer going to her dock on the ebb tide would go on the north side of the channel, as I have already said.

Int. 31. What proportion of small vessels in going down the harbor pass outside the school-ship?

Ans. Probably three-quarters, going down the harbor.

Cross-examination by L. S. Dabney, esq., of counsel for libellants:

Cross-int. 1. When you say that in taking the steamer "Java," or a steamer of her size across the stern of the school-ship, there would
252 be no unusual risk of suddenly meeting a small vessel the other side, I suppose you have it in your mind that a small vessel would be easily seen from the bridge of the steamer over the school-ship, haven't you?

Ans. You might see the masts; or if she had canvas up you could see her canvas, and you could tell then that she was in motion. If you could see nothing but her masts, you could not tell whether she was in motion or not, because you couldn't see her position.

Cross-int. 2. There would be no difficulty, however, in seeing either the masts or the canvas of any vessel that might be there?

Ans. Well, there would be some difficulty in seeing the masts of a small vessel, if they happened to be hid by the school-ship's masts; if they happened to be in exact range.

Cross-int. 3. Would it be easy for a vessel of the size of the "James McCloskey" to hide herself behind the school-ship from the view of a person standing on the bridge of the "Java," approaching from the other side and within a couple of lengths of the school-ship?

Ans. Vessels of that size would be likely to hide the hull of her if not the masts; she couldn't hide her masts unless she was in exact range of the school-ship's masts.

Cross-int. 4. Do you understand when you say that there would be danger of sheering if you should anchor a steamer approaching the school-ship, as you have testified in your direct examination, that you are asked as to a steamer which is not supposed to go nearer than fifty feet to the school-ship in any event, and had not got up quite as far as the school-ship at the time to which the question relates, and that the tide is ebbing?

Ans. I should say that if you let go the anchor with the speed the ship had on when approaching the school-ship, she would be likely to sheer into her by letting her anchor go; that was my idea.

Cross-int. 5. You are steering to a point at least fifty feet astern of of the school-ship, are you not?

Ans. I supposed about that; I don't say it couldn't be less than that; we generally intend to go as near the school-ship as we can prudently.

Cross-int. 6. Would it be prudent to go nearer than fifty feet?

253 Ans. Not to take all chances. I don't know as it would be prudent to make a calculation of less than fifty feet.

Cross-int. 7. At what rate of speed do you assume that you are going?

Ans. At the time the question was asked the ship was going at about half speed, about three, four, or five knots.

Cross-int. 8. How fast is the tide running?

Ans. At this time the tide was about an hour ebb, and it generally runs then from a knot to a knot and a half.

Cross-int. 9. How fast is the ship going over the ground?

Ans. All I know is from the evidence given in. I should say three, four, or five knots, less this knot and a half tide.

Cross-int. 10. Suppose she were going three knots through the water and you dropped an anchor which held, would not the tide carry her away from the school-ship?

Ans. No, sir; not till she was stopped; if she was going three knots, she was going towards the school-ship all the time.

Cross-int. 11. If she was steering to a point fifty feet astern of the school-ship, she would not get nearer than within fifty feet of the school-ship, even if brought to anchor, would she?

Ans. If she had the speed of three or four knots on she would be likely to sheer into the school-ship all of fifty feet, or be likely to come into collision with the school-ship by being sheered.

Cross-int. 12. Do you mean three or four knots over the ground or through the water?

Ans. Well, three or four knots through the water. I consider the tide was ebbing from a knot or a knot and a half, and if the ship was going two or three knots even, the letting go the anchor would be likely to bring her into collision, or sheer her all of fifty feet.

Cross-int. 13. Wouldn't she be most likely to sheer the other way?

Ans. If the helm was put to starboard and the engines stopped or reversed, as I supposed, the ship was canting that way and would be likely to continue to sheer that way, and be in danger of coming into collision with the school-ship.

Cross-int 14. Does the rudder have much effect on a screw steamer when you are reversing the engines?

254 Ans. If she has headway it does, or if she has a great deal of sternway.

Cross-int. 15. Suppose she is going four knots against a one and a half knot tide, and her engines are stopped, and then, after she has gone seven hundred feet, reversed, is the rudder of much use?

Ans. It depends upon whether she had any headway; if she had, it would have some effect, if she had not, it wouldn't.

Cross-int. 16. Can't you judge whether in the case supposed, she would have any headway?

Ans. I should think she would have a little headway, very little indeed.

Cross-int. 27. Don't you know that it would be so little that the rudder would be of almost no use?

Ans. I should say that with so very little headway, it would be of very little use.

Cross-int. 28. Has the position of the school-ship's moorings been changed within the last three years?

Ans. I do not know; I think not.

Cross-int. 19. In answering the questions asked you on direct examination, you have assumed, have you not, that when the vessel, which it is desired to avoid colliding with, is discovered, the steamer is going at least four knots through the water and is nearly up with the school-ship?

Ans. Three and a half or four knots; yes, sir.

Cross-int. 20. And it is with that understanding, I suppose, that you have stated what it would be prudent and what imprudent to do.

Ans. Yes, sir.

JOHN B. GARDNER.

Deposition of Jesse G. Lovell.

Direct examination by W'm G. Russell, esq., proctor for respondents.

FEB. 10, 1870.

Int. 1. What is your name, age, residence, and occupation, and how long have you been engaged in it?

Ans. My name is Jesse G. Lovell; age, forty-one; residence,
255 Boston, Mass.; I am a master mariner and coast pilot; have been coast pilot about fifteen years. My branch as coast pilot is from the United States Government.

Int. 2. Are you, or not, familiar with the harbor of Boston? What classes of vessels have you been accustomed to pilot up and down that harbor, and elsewhere?

Ans. I am familiar with it, perfectly; I have run a tug-boat there off and on for four years. I have piloted three Government steamers, and vessels of all classes; among others, the frigate "Ammonoosuck," the frigate "Franklin," the "Rhode Island," the "Monadnock," and others. I have also piloted the "Great Eastern" from Block Island to Flushing Bay. I have also piloted the New York, Philadelphia, and New Orleans steamers, up and down the harbor of Boston. I was pilot of the steamer "William Jenkins," from Baltimore to Boston, for about two years and a half.

Int. 3. Are you acquainted with the Cunard steamships, and with the "Java" of that line?

Ans. Yes, sir; but I have never piloted any of them, not being a branch pilot of Boston.

Int. 4. Are you familiar with the location of the school-ship "George M. Barnard," at her winter moorings in the harbor of Boston?

Ans. I am.

Int. 5. Examine the chart now shown you, marked "Mr. Boschke's plan," and state whether or not the position of said ship and her moorings is correctly laid down there.

Ans. Yes, sir; I should say that it was.

Int. 6. Are you familiar with the set of the tides at the place where said ship lies?

Ans. Yes, sir.

Int. 7. Suppose the tide to be one hour ebb of a spring tide, and the wind a three or four knot breeze from the west, how would the school-ship head at her moorings?

Ans. About north-northwest. She is heading on this chart, as near as I can make it, head to the tide.

Int. 8. (De bene esse.) State, if you know, whether there is
256 any rule, custom, or usage, for the Cunard steamers or other steamers, entering the harbor of Boston, not to go inside the school-ship at her moorings.

(Objected to.)

Ans. No, sir; we go wherever we can make it most convenient, using our own discretion.

Int. 9. (De bene esse.) State what you do know as to the usage or practice of steamers, in regard to passing inside the school-ship, including your own experience.

(Objected to.)

Ans. I have been inside a great many times myself, with steamers; I have been inside with the steam frigate "Ammonoosuck," the steamships "Concordia," "Ladoga," and "Cortes;" and frequently with the "William Jenkins," when it was more convenient to make the turn. I have frequently seen the New York, the Baltimore, Philadelphia, and the New Orleans steamers go inside; I have also seen the Cunard steamers go inside.

Int. 10. (De bene esse.) Of what class and draft are the steamers you have spoken of in your last answer?

Ans. The "Ammonoosuck," is a ship of about 3,500 tons, with three

hundred and seventy-four feet of keel, and drawing sixteen or seventeen feet. The "Concordia" is 1,800 tons, drawing, I think, eighteen feet. The "Ladoga" is 1,200 tons, drawing sixteen feet. As a general thing the steamers of the regular lines from New York, Philadelphia, Baltimore, and New Orleans, draw from fifteen to twenty feet loaded, and are from eleven hundred to two thousand tons.

Int. 11. (De bene esse.) Suppose that you were piloting a steamship like the "Java," drawing nineteen feet, up the harbor bound for the Cunard dock at East Boston, with the wind from the west a three or four knot breeze, and at one hour ebb of a spring tide, and that the school-ship were not in the harbor, and that there were no obstructions to your course, what would be your ordinary and proper course, with reference to the moorings of the school-ship?

(Objected to.)

Ans. If the school-ship wasn't there, I should go right exactly where she lies.

Int. 12. (De bene esse.) Suppose the wind and tide as stated
257 in the eleventh interrogatory, and that the school-ship were lying at her moorings, what would be your proper course in coming up the harbor to the same dock from the Upper Middle; and how would the course be determined?

Ans. I should go inside of her by all means, because that would make my landing better; I could go straight to my dock. I should determine at somewhere near Slate Ledge which side I should go. If there were vessels inside, to the eastward, I shouldn't go there. If the channel was full to the westward of her, I should go to the eastward of her.

Int. 13. Suppose, with the wind and tide as stated, that at the Upper Middle you had a clear view between the school-ship and your dock, and that no vessels were there at anchor or sailing, and that you observed vessels at anchor to the westward of the school-ship, what would be the proper course for you to take?

Ans. I should go inside of the school-ship, by all means.

Int. 14. Where in your course should you determine, under the circumstances stated in the last interrogatory, whether to go inside or outside the school-ship, and where and how should you change your course in order to go inside if you so determined?

Ans. Up near the Slate Ledge buoy. I should put my helm a-port and keep her head to the north-northwest to go inside the school-ship. I should go in about fifty or sixty feet from her stern. That would take you right to the dock.

Int. 15. Suppose, with wind and tide as stated in the eleventh interrogatory, you had observed at the Upper Middle a free course between the school-ship and your dock, and that you had brought your ship up the channel to the point marked by the letter C in the word channel on the chart now shown you marked "A, W. W., Jr.", and that you then observed several vessels at anchor to the westward of the school-ship in the way to your dock if you should go outside of her, would it in your opinion be an unusual or venturesome navigation for you to go inside the school-ship in the manner stated in your thirteenth answer, or how otherwise?

Ans. No, sir; I should go inside, by all means.

Int. 16. Under the circumstances stated in the last preceding question, would you or not consider it proper to go outside the school-ship?
258 Ans. No, sir, I should not.

Int. 17. State whether the risk which you would incur by running close by the stern of the school-ship in the manner stated by you

of meeting an unseen boat or vessel coming out from behind the school-ship is an unusual risk, or how otherwise.

Ans. Yes, sir, it is rather an unusual risk. It is very seldom—no, not very seldom—that they come down on that side. They come down as much one side as the other—and they are more likely to be anchored on the west side than on the other.

Int. 18. How common or uncommon is it for you, in piloting steamers up this harbor with an ebb tide, to pass by the sterns of ships at anchor in the channel in the manner stated by you?

(Objected to.)

Ans. It is an every-day occurrence.

Int. 19. Suppose, with the wind and tide as stated in the eleventh interrogatory, that in passing the stern of the school-ship with a steamer like the "Java," in the manner stated in your thirteenth answer, your engines having stopped and your speed being reduced to three or four knots, just before you came up with the school-ship's stern, you should discover a schooner which had been hidden from view by the school-ship, about abreast the starboard bow of the school-ship, with her foresail partly up, and about two or three lengths off from you, heading down the harbor, a little off from the line of the school-ship, and so that if you continued your course you must come into collision with her, what would it be proper for you to do on board the "Java?"

(Objected to.)

Ans. Well, sir, I should immediately stop my engines, and then ring to have them back at full speed, and heaving my helm hard starboard, —it would then be the hardest fend-off.

Int. 20. Would it, in your opinion, upon the facts stated, be practicable to do anything else on board the "Java," to avoid the collision?

Ans. No, sir, it would not.

Int. 21. Upon the facts stated, would it or not be practicable, or safe, or proper, to anchor the "Java," or how otherwise?

Ans. No, sir, it would not.

Int. 22. Would you or not deem it proper, under the circum-
259 stances stated, to anchor a ship like the "Java," with the expectation that she would drag her anchor fifty feet?

Ans. No, sir, she would part her chain.

Int. 23. State whether it is, or not, usual for vessels to lie at anchor to the west and northwest of the school-ship's moorings, and how does the number of vessels so anchoring compare with those anchoring to the north and east of the school-ship?

(Objected to.)

Ans. There are far more that anchor to the northward and westward than what there is to the eastward of her.

Cross-examination by L. S. Dabney, esq., proctor for libellant:

Cross-int. 1. How long have you been familiar with the harbor of Boston?

Ans. Well, some thirty years, twenty-five or thirty.

Cross-int. 2. Has your attention been directed to observing whether steamers passed inside or outside of the school-ship?

Ans. Not particularly, but I have seen them oftentimes.

Cross-int. 3. At these times when you have been inside the school-ship with the "Ammonoosuck," "Ladoga," and "Concordia," has the school-ship been at anchor at her moorings?

Ans. Yes, sir.

Cross int. 4. What Cunard steamers have you seen come up inside the school-ship?

Ans. I don't recollect their names, but I have seen them on several occasions, but not being particularly interested can't give the names. I saw the "America" and "Europa," side-wheel ships, because I was on Cunard wharf when they came in; I have seen others, but don't recollect their names; it is a common occurrence.

Cross-int. 5. Suppose, under the circumstances stated in the twelfth direct interrogatory, there were vessels at anchor to the eastward of the school-ship and also vessels to the westward of the school-ship, which way would you go to your dock?

Ans. Well, I should pick out where the least vessels were; if there were vessels to the eastward of the school-ship, I should go to the
260 westward of her, and if there were vessels to the westward I should go inside of her, according to where was the best chances; we have to use our own judgment.

Cross-int. 6. How wide is the channel inside the school ship, with a spring tide one hour ebb, for a vessel of the size of the "Java?"

Ans. Well, it's three or four hundred yards wide; between three and four hundred.

Cross-int. 7. Have you ever tried anchoring steamers when they were going ahead?

Ans. Yes, sir.

Cross-int. 8. What is the fastest rate of speed at which it is practicable to anchor a steamer of the size of the "Java," in your judgment?

Ans. We usually anchor a steamer or any vessel when she has stopped her headway, got sternway on. I wouldn't let go an anchor with a steamer of the size of the "Java" when she was going more than a mile an hour.

Cross-int. 9. Do you know the pilot Elbridge G. Martin?

Ans. Yes, sir; am well acquainted with him.

Cross-int. 10. How long?

Ans. Well, sir, for the last eighteen or twenty years.

Cross-int. 11. What are your relations with him?

Ans. Nothing at all, sir; only friendship, that's all.

Cross-int. 12. Have you heard him speak of running into a schooner when he was taking the "Java" up inside the school-ship?

Ans. Yes, sir.

Cross-int. 13. When?

Ans. I heard him a year ago or more, or two years ago; it's so long ago I have forgotten all about it.

Cross-int. 14. You have heard the matter talked over, I suppose?

Ans. Oh, yes; talked over amongst the pilots, of the steamer "Java" running into a schooner behind the school-ship; that's all I know about it.

Cross-int. 15. You made up your mind who was to blame, did you not?

Ans. I never made up my mind at all about it; I didn't see the circumstances. I don't know nothing about it, except in my opinion the schooner was entirely to blame.

261 Cross-int. 16. You have been of that opinion for a long time, haven't you?

Ans. Yes, sir.

Cross-int. 17. How fast does the tide run where the school-ship lies; a spring tide one hour ebb?

Ans. Runs about a mile an hour.

Cross-int. 18. Suppose you were bringing a steamer of the size of the "Java," three hundred and fifty feet long, up the harbor with a spring tide one hour ebb, and the wind west, blowing a three-knot breeze, suppose you were moving through the water at the rate of four knots, and when you arrived within four lengths of the school-ship you stopped your engines; how fast would your steamer be going over the ground when she got up to within one length of the school-ship?

Ans. Be going about three miles an hour over the ground, she wouldn't stop more than one mile. Supposing her to be going four miles through the water when she stopped, she would be going about two and a half miles over the ground after running three times her length; she would stop more in the next three lengths.

Cross-int. 19. How far do you judge a steamer of the "Java's" size would go against a one-knot tide, and a three-knot breeze with her engines stopped, before she brought up, if she were going four knots through the water when the engines were stopped?

Ans. She would go a half or three-quarters of a mile before she stopped, if she was loaded; if she was not loaded it would make quite a difference; drawing twenty feet, she would go about a half a mile.

Direct examination resumed:

Int. 1. Were you present at the trial of this cause in the district court, and did you hear the testimony there giving?

Ans. I was present and did hear it.

Int. 2. In the conversations of the pilots in regard to this collision which you have spoken of, did you ever hear any blame imputed to Captain Martin, the pilot?

(Objected to.)

Ans. I did not.

262 Int. 3. What is the character and reputation of Captain E. G. Martin among the pilots, for prudence and skill in his business as a pilot?

(Objected to.)

Ans. There is no better pilot in Boston than Mr. Martin, none respected any more or of higher qualifications.

Cross-examination resumed:

Cross-int. 1. Were you present the whole time of the trial, and did you listen to all the evidence?

Ans. No, sir, I wasn't present the whole time, but I was there three days, I think.

Cross-int. 2. What pilots have you heard talk the matter over? Mention their names?

Ans. I have heard the two Mr. Martins, William Maxfield and John Maxfield, Maxwell Read, Stephen Burroughs, John Bruce—oh, I don't know, I have heard forty of them.

JESSE G. LOVELL.

Deposition of John Low.

Direct examination by W'm G. Russell, esq., proctor for respondents.

FEB. 17, 1870.

Int. 1. What is your name, age, residence and occupation, and how ong have you been engaged in it?

Ans. John Low; I am thirty-nine years of age; I reside in Chelsea,

Mass.; I am a branch pilot for the port of Boston. I got my in 1853.

Int. 2. Are you, or not, familiar with the harbor of Boston? classes of vessels have you been accustomed to pilot up and down that harbor?

Ans. I am familiar with it, and have been accustomed to pilot all kinds of vessels up and down.

Int. 3. State whether you are familiar with the Cunard steamships, and with the steamship "Java" of that line, and whether you have had charge of any of said ships as pilot.

263 Ans. I have had charge of almost all of their ships as pilot. I can't recollect whether I have brought up the "Java," but I have the "China" and the "Cuba," which are of the same class as the "Java." I know the "Java."

Int. 4. Are you familiar with the location of the school-ship "George M. Barnard" at her winter moorings in the harbor of Boston?

Ans. Yes, sir, I know where she lays.

Int. 5. Examine the chart now shown you, marked "Mr. Boschke's plan," and state whether or not the position of said ship at her moorings is correctly laid down there.

Ans. Well, I should judge from the looks of this that it was not far out of the way.

Int. 6. Are you familiar with the set of the tides at the place where said ship lies?

Ans. Yes, sir.

Int. 7. Suppose the tide to be one hour ebb at a spring tide, and the wind a three or four knot breeze from the west, how would the school-ship head at her moorings?

Ans. She would head northwest by west, or west-northwest, I should think; about as shown on this chart.

Int. 8. (De bene esse.) State, if you know, whether there is any rule, custom, or usage for the Cunard steamers or other steamers entering the harbor of Boston, not to go outside the school-ship at her moorings.

(Objected to.)

Ans. No, sir, there is no rule not to go, nor any rule to go; it depends upon the pilot's judgment as to how the tide is, and how the vessels lay.

Int. 9. (De bene esse.) State what you do know as to the usage or practice of steamers, in regard to passing inside the school-ship, including your own experience.

(Objected to.)

Ans. I should think that I had been up inside the school-ship on an average about one in five, that I have piloted up, of the Cunard steamers; I have seen other pilots bring up the Cunard steamers inside. Other steamers frequently come up inside, such as the Baltimore

264 steamers; and the Eastern steamers coming up to Commercial wharf almost always go inside where they want to make a turn. I have seen also the New York, New Orleans, and Philadelphia steamers come up inside, when the channel was clear.

Int. 10. (De bene esse.) Of what class and draft are the steamers of the New Orleans, New York, Philadelphia, and Baltimore lines, you have spoken of in your last answer?

Ans. The New York steamers I should think are on the average, about 1,600 tons, and draw from about fifteen to sixteen feet. The other

Cross-int. 18. Suppose you were bringing a steamer of the size of the "Java," three hundred and fifty feet long, up the harbor with a spring tide one hour ebb, and the wind west, blowing a three-knot breeze, suppose you were moving through the water at the rate of four knots, and when you arrived within four lengths of the school-ship you stopped your engines; how fast would your steamer be going over the ground when she got up to within one length of the school-ship?

Ans. Be going about three miles an hour over the ground, she wouldn't stop more than one mile. Supposing her to be going four miles through the water when she stopped, she would be going about two and a half miles over the ground after running three times her length; she would stop more in the next three lengths.

Cross-int. 19. How far do you judge a steamer of the "Java's" size would go against a one-knot tide, and a three-knot breeze with her engines stopped, before she brought up, if she were going four knots through the water when the engines were stopped?

Ans. She would go a half or three-quarters of a mile before she stopped, if she was loaded; if she was not loaded it would make quite a difference; drawing twenty feet, she would go about a half a mile.

Direct examination resumed:

Int. 1. Were you present at the trial of this cause in the district court, and did you hear the testimony there giving?

Ans. I was present and did hear it.

Int. 2. In the conversations of the pilots in regard to this collision which you have spoken of, did you ever hear any blame imputed to Captain Martin, the pilot?

(Objected to.)

Ans. I did not.

262 Int. 3. What is the character and reputation of Captain E. G. Martin among the pilots, for prudence and skill in his business as a pilot?

(Objected to.)

Ans. There is no better pilot in Boston than Mr. Martin, none respected any more or of higher qualifications.

Cross-examination resumed:

Cross-int. 1. Were you present the whole time of the trial, and did you listen to all the evidence?

Ans. No, sir, I wasn't present the whole time, but I was there three days, I think.

Cross-int. 2. What pilots have you heard talk the matter over? Mention their names?

Ans. I have heard the two Mr. Martins, William Maxfield and John Maxfield, Maxwell Read, Stephen Burroughs, John Bruce—oh, I don't know, I have heard forty of them.

JESSE G. LOVELL.

Deposition of John Low.

Direct examination by W'm G. Russell, esq., proctor for respondents.

FEB. 17, 1870.

Int. 1. What is your name, age, residence and occupation, and how ong have you been engaged in it?

Ans. John Low; I am thirty-nine years of age; I reside in Chelsea,

Mass.; I am a branch pilot for the port of Boston. I got my branch in 1853.

Int. 2. Are you, or not, familiar with the harbor of Boston? What classes of vessels have you been accustomed to pilot up and down that harbor?

Ans. I am familiar with it, and have been accustomed to pilot all kinds of vessels up and down.

Int. 3. State whether you are familiar with the Cunard steamships, and with the steamship "Java" of that line, and whether you have had charge of any of said ships as pilot.

263 Ans. I have had charge of almost all of their ships as pilot. I can't recollect whether I have brought up the "Java," but I have the "China" and the "Cuba," which are of the same class as the "Java." I know the "Java."

Int. 4. Are you familiar with the location of the school-ship "George M. Barnard" at her winter moorings in the harbor of Boston?

Ans. Yes, sir, I know where she lays.

Int. 5. Examine the chart now shown you, marked "Mr. Boschke's plan," and state whether or not the position of said ship at her moorings is correctly laid down there.

Ans. Well, I should judge from the looks of this that it was not far out of the way.

Int. 6. Are you familiar with the set of the tides at the place where said ship lies?

Ans. Yes, sir.

Int. 7. Suppose the tide to be one hour ebb at a spring tide, and the wind a three or four knot breeze from the west, how would the school-ship head at her moorings?

Ans. She would head northwest by west, or west-northwest, I should think; about as shown on this chart.

Int. 8. (De bene esse.) State, if you know, whether there is any rule, custom, or usage for the Cunard steamers or other steamers entering the harbor of Boston, not to go outside the school-ship at her moorings.

(Objected to.)

Ans. No, sir, there is no rule not to go, nor any rule to go; it depends upon the pilot's judgment as to how the tide is, and how the vessels lay.

Int. 9. (De bene esse.) State what you do know as to the usage or practice of steamers, in regard to passing inside the school-ship, including your own experience.

(Objected to.)

Ans. I should think that I had been up inside the school-ship on an average about one in five, that I have piloted up, of the Cunard steamers; I have seen other pilots bring up the Cunard steamers inside. Other steamers frequently come up inside, such as the Baltimore

264 steamers; and the Eastern steamers coming up to Commercial wharf almost always go inside where they want to make a turn. I have seen also the New York, New Orleans, and Philadelphia steamers come up inside, when the channel was clear.

Int. 10. (De bene esse.) Of what class and draft are the steamers of the New Orleans, New York, Philadelphia, and Baltimore lines, you have spoken of in your last answer?

Ans. The New York steamers I should think are on the average, about 1,600 tons, and draw from about fifteen to sixteen feet. The other

lines range from 1,200 to 1,800 tons, and draw from fifteen feet to nineteen feet, when loaded.

Int. 11. (De bene esse.) Suppose that you were piloting a steamship like the "Java," drawing nineteen feet, up the harbor, bound for the Cunard dock at East Boston, with the wind from the west a three or four knot breeze, and at one hour ebb of a spring tide, and that the school-ship were not in the harbor and that there were no obstructions to your course, what would be your ordinary and proper course, with reference to the moorings of the school-ship?

(Objected to.)

Ans. I should go very handy to the school-ship's moorings.

Int. 12. (De bene esse.) Suppose the wind and tide as stated in the eleventh interrogatory, and that the school-ship were lying at her moorings, what would be your proper course in coming up the harbor, to the same dock from the Upper Middle, and how would the course be determined?

Ans. I should calculate to come up channel-way till I got up half way, and then, if I saw no vessels in the way, head up to the tide to the Cunard dock.

Int. 13. Suppose the wind and tide as stated, that at the Upper Middle you had a clear view between the school-ship and your dock, and that no vessels were there at anchor or sailing, and that you observed vessels at anchor to the westward of the school-ship, what would be the proper course for you to take?

Ans. I should come up inside the school-ship and the vessels at anchor, to the northward of them.

Int. 14. Where in your course should you determine, under
265 the circumstances stated in the last interrogatory, whether to go inside or outside of the school-ship, and where and how should you change your course in order to go inside, if you so determined?

Ans. I should make up my mind before I got to the Slate Ledge, or about the time I got there; I should then port my wheel and go up inside; I should calculate to go within a hundred feet of the stern of the school-ship, provided there were no other vessels in the way besides the school-ship; after passing her stern, I should go straight to the Cunard dock.

Int. 15. Suppose with wind and tide as stated in the eleventh interrogatory, you had observed at the Upper Middle a free course between the school-ship and your dock, and that you had brought your ship up the channel to the point marked by the letter C in the word Channel, on the chart now shown you marked, "A, W. W. Jr.," and that you then observed several vessels at anchor to the westward of the school-ship, in the way to your dock, if you should go outside of her, would it, in your opinion, be an unusual or venturesome navigation, for you to go inside the school-ship, in the manner stated in your thirteenth answer, or how otherwise?

Ans. No, sir; I should go inside the school-ship.

Int. 16. Under the circumstances stated in the last preceding question, would you or not, consider it proper to go outside the school-ship?

Ans. No, I should not; it would be more work to get her to her dock. It would be better to go inside.

Int. 17. State whether the risk which you would incur by running close by the stern of the school-ship, in the manner stated by you, of meeting an unseen boat or vessel coming out from behind the school-ship is an unusual risk, or how otherwise?

Ans. It is an uncommon thing to have happen, to have one come out

by the school-ship and not see it. I should not consider it an unusual risk to run, in that way, by the stern of the ship.

In. 18. How common or uncommon is it for you in piloting steamers up the harbor with an ebb tide, to pass by the sterns of ships at anchor in the channel, in the manner stated by you?

(Objected to.)

266 Ans. We do it most every time we come up, either by the head or the stern.

Int. 19. Suppose, with wind and tide as stated in the eleventh interrogatory, that in passing the stern of the school-ship with a steamer like the "Java," in the manner stated in your fourteenth answer, your engines having stopped and your speed being reduced to three or four knots, just before you came up with the school-ship's stern, you should discover a schooner which had been hidden from view by the school-ship, about abreast the starboard bow of the school-ship, with her foresail partly up, and about two or three lengths off from you, heading down the harbor, a little off from the line of the school-ship, and so that if you continued your course you must come into collision with her, what would it be proper for you to do on board the "Java?"

Ans. I should turn her back at full speed. Well, you would also naturally put your helm to the starboard, but it would not do much good, as they do not answer the wheel much after you turn back.

Int. 20. Would it in your opinion, upon the facts stated, be practicable to do anything else on board the "Java," to avoid the collision?

Ans. No, sir.

Int. 21. Upon the facts stated, would it or not be practicable or safe or proper to anchor the "Java," or how otherwise?

Ans. You might have let gone your anchor, but I don't believe that you would have seen it again; it would have parted the chain. (The question being repeated to the witness, he says:) No, I have told you it wouldn't.

Int. 22. Would you or not deem it proper, under the circumstances stated, to anchor a ship like the "Java" with the expectation that she would drag her anchors fifty feet?

Ans. No, sir; I don't think she could have dragged her anchor fifty feet. I think it would have taken hold and parted the chain before it would have done that.

Int. 23. State whether it is or not usual for vessels to lie at anchor to the westward or northwestward of the school-ship's moorings, and how does the number of vessels so anchoring compare with those anchoring to the northward and eastward of the school-ship?

(Objected to.)

267 Ans. There are more which anchor at the westward of the school-ship, scarcely any anchor at the eastward of her.

Cross-examination by L. S. Dabney, esq., proctor for libellants.

Cross-int. 1. If the anchor took hold and parted the chain it would stop her way somewhat, would it not?

Ans. Very little.

Cross-int. 2. How could a vessel come out from behind the school-ship when you were bringing a steamer up by her stern to go inside of her in the way you have stated, without your seeing her, if you were on the lookout?

Ans. Well, by not having any canvas set, and by being directly in range.

Cross-int. 3. What do you mean, exactly, when you say by being directly in range?

Ans. I mean the school-ship being in range between the vessel and the steamer.

Cross-int. 4. Well, then I understand you if the schooner had sail set you couldn't help seeing her?

Ans. I think that if the schooner had her sail hoisted up you would see her canvas over the school-ship, but if she did not have her sail up but only her masts, and they were in range with the school-ship's masts you would not notice them, and if you did, you would think she was at anchor.

Cross-int. 5. How fast does the tide run where the school-ship lies—a spring tide, one hour ebb?

Ans. Between one and two knots—say a knot and a half.

Cross-int. 6. Suppose you were bringing a steamer of the size of the "Java," three hundred and fifty feet long, up the harbor, with a spring tide one hour ebb, and the wind west, blowing a three-knot breeze; suppose you were moving through the water at the rate of four knots, and when you arrived within four lengths of the school-ship you stopped your engines, how fast would your steamer be going over the ground when she got up to within one length of the school-ship?

Ans. Well, she would be going, I should say, two knots and a
268 half—nearly—over the ground; she would not lose her headway much in going three times her length without turning back. If you should stop a Cunarder going half speed, at the school-ship, against a knot and a half tide without turning back, she would shoot by Cunard dock; but, mind you, when she is going at half speed she is going at more than four knots—she is going at eight knots. Those vessels go very fast at half speed. They go four knots when they are at "slow," as they generally are when they pass the Upper Middle.

Cross-int. 7. What is the number of the pilot-boat to which you are attached?

Ans. Number four.

JOHN LOW.

Deposition of William T. Browne, taken before Winslow Warren, jr., U. S. Commissioner.

Direct examination by W'm G. Russell, esq., proctor for claimants.

APRIL 6, 1870.

Int. 1. What is your name? Was your deposition taken in this case for the trial in the district court?

Ans. My name is William Thomas Browne; my deposition was taken for that trial.

Int. 2. In what service have you been employed since your deposition was so taken, and in what capacity, and in what ship are you now?

(Objected to.)

Ans. I have been employed in the Cunard service; in 1868 I took command of one of their ships, the "British Queen," in the winter of 1868; I am now commander of the "Aleppo;" I had command of the "British Queen" while the "Java" was laid up; when she was put on again I went back to her as chief officer, and remained with her until I took the "Aleppo" last Christmas. I have just made my third voyage in her.

Int. 3. How long had you been in the "Java" before her collision with the "McCloskey" in November, 1866?

(Objected to.)

269 Ans. I joined the "Java" in May, 1866.

Int. 4. What was the first trip of the "Java" to Boston?

Ans. In October, 1866; I mean the trip on which the collision occurred; I think we left Liverpool October 27, and arrived here November 7.

Int. 5. Where was the "Java" July 2, 1866?

Ans. In New York.

Int. 6. Were you on board the "Java" July 2, 1867, and did she arrive in Boston harbor in the evening of that day?

Ans. I was then on board, and she did arrive in Boston harbor then.

Int. 7. Did she go to her dock that night or not?

Ans. No, sir.

Int. 8. Why not?

Ans. Because the dock was occupied by the "China."

Int. 9. What did the "Java" do that night?

Ans. We brought up off Union wharf, landed the passengers and mails there, laid there until the next morning after the "China" left for Liverpool; the "China" left at ten, and we docked at eleven.

Int. 10. Did you anchor the "Java" that night in order to avoid a collision with any vessel?

Ans. No, sir.

Int. 11. Did you hear that night or at any time that your ship was in danger of collision with any vessel that night?

(Objected to.)

Ans. No, sir.

Int. 12. Where were you stationed on board the "Java" that night, and what were you doing?

Ans. At my usual place on the forecastle, looking out and waiting for orders to let go the anchor.

Int. 13. Were you expecting to receive those orders?

(Objected to.)

Ans. Of course.

Int. 14. Why did you so expect?

(Objected to.)

Ans. Because it's always usual to look out for the captain's orders to do so. We knew we were to bring her up, and we knew we

270 could not get into our dock that night; we knew it by the tender that came alongside for the mails.

Int. 15. State whether or not on that night you brought the "Java" to anchor while she was going ahead at the rate of two or three knots per hour.

Ans. We did not.

Int. 16. State how you brought her to anchor.

(Objected to.)

Ans. The ship was brought up in Captain Moodie's usual manner of doing so; this I am perfectly confident is not his habit—he never does such a thing—when the ship is going two or three knots an hour. It depends upon circumstances how we bring her up. [I think Captain Moodie always has sternway on the ship before he lets go the anchor, I myself do.]

(Part in brackets objected to, on behalf of complainants.)

Int. 17. What in your opinion would be the effect of bringing the "Java" to anchor while going ahead at two knots per hour?

(Objected to.)

Ans. There would be danger of parting the cable.

Int. 18. State whether you saw that night any schooner or other vessel with which you were in any danger of collision.

Ans. I don't remember of having seen any vessel that night.

Int. 19. Examine the photograph now shown you marked "Exhibit W. W. Jr., 3," and state what it represents, and when it was taken, and how you know about it.

Ans. It represents the "Java" where she was brought up on the night of the 2d of July. It was taken the following morning before the "China" came out of her dock. I knew that it was going to be taken, though I didn't know the exact moment when he was taking it; I bought several copies of it of Mr. Whipple, who took it. I knew he was there for taking it, though I didn't know the exact time he was taking it, or I should have had the yards squared for the purpose. I told Mr. Whipple when he showed me the first copy that if I had known he was taking it I should have had my ship made decent, for I had my ropes out for the purpose of going into dock. The chalk mark on her port gangway was put there at Halifax to give notice to passengers of her time of sailing.

271 Int. 20. From the time you anchored on the night of July 2, 1867, to the time this photograph was taken, was the anchor of the "Java" raised?

(Objected to.)

Ans. No, sir.

Int. 21. At the time of the collision between the "Java" and the "McCloskey," in November, 1866, state whether or not at the time you discovered the "McCloskey" it would, in your opinion, have been practicable or proper for the "Java" to have anchored.

(Objected to.)

Ans. It would have been impracticable, it would have been improper to have done so—(upon the answer being read to the witness, he says) I do not mean to say "impracticable." I did not say so.

Int. 22. State the reasons of your opinion.

(Objected to.)

Ans. Because there was nothing at all in our way astern of us; the engines being reversed we had plenty of room to go astern, which we did do; she was also too close to the school-ship to have anchored.

Int. 23. State what would have been the effect of anchoring the "Java" when you first discovered the "McCloskey."

(Objected to.)

Ans. She would have been in danger of getting afoul of the school-ship; in fact, no one seeing the position of the vessel would think of letting go the anchor under the circumstances; it was the last thing they would think of. In letting go the anchor there you would have been in danger of running over the anchor.

Int. 24. What would have been the effect of anchoring the "Java" in the case supposed, as to her anchor or chain holding?

(Objected to.)

Ans. She would have been in danger of parting the cable. I think, though I would not swear to its being correct, the ship was going from a mile and a half to two miles an hour then.

Int. 25. State whether or not at the time of the collision your anchors were in readiness to be dropped, or how otherwise.

(Objected to.)

Ans. They were ready; one anchor was ready to let go instantly.

Int. 26. State whether before testifying you have examined the log of

the "Java" for July 2 and 3, 1867, and by whom was that log kept?
272 (Objected to.)

Ans. I have examined it; it was kept by me.

Int. 27. Will you produce the log, that the commissioner may make a copy of entries of July 2 and 3, 1867?

Ans. I do. (Such portions of the log for those days as were agreed upon by both parties to this suit to be referred to in above question are annexed, marked "Exhibit 4, W. W. Jr.")

Cross-examination by L. S. Dabney, esq., proctor for libellants:

Cross int. 1. (De bene esse.) Was your opinion that the "Java" when the "McCloskey" was discovered on the occasion of the collision was too close to the school-ship to anchor, formed at that time, or is it your opinion formed now, or at some time since the collision, from your recollection of the position of the vessels?

Ans. It was my opinion then; and since my evidence was given before I have never heard it spoken about or thought of it until within the last two days, and it is my opinion now.

Cross-int. 2. (De bene esse.) Do you mean to say that when you saw the schooner the thought occurred to you we are too close to the school-ship to anchor?

Ans. That thought did not come into my head at all about anchoring; no one would have thought of such a thing.

Cross-int. 3. (De bene esse.) Which way is the "Java" heading in the photograph?

Ans. I can't tell you—I don't know—I don't know the bearings of anything.

Cross-int. 4. (De bene esse.) Do you know where the photographer took his picture from?

Ans. No, sir; I know it was taken from some one of the wharves on the East Boston side.

W. T. BROWNE.

273 EXHIBIT 4, W. W. JR.

Copy of that portion of log-book which both parties agreed should be annexed in answer to the twenty-seventh direct interrogatory to W'm T. Browne.

R. M. Steamship Java, E. R. Moodie, Esq., Commander, from Liverpool towards Boston via Halifax, Tuesday, 2 July, 1867.

REMARKS.

P. M. Light winds and fine clear weather
6. 00 do. weather
6 40 Slow and stopd—received Pilot from No 8 boat
6 45 proceeded full speed
8 40 Minot's Ledge Light abeam
9 08 Boston Outer Lt do 9 15 Narrows Light
9 18 Slow in the Narrows 9 22 Stopd for Customs Boat
9 25 Proceeded half speed 9 27 passed Inner Light
10 00 Brought up off Cos Dock East Boston—tender alongside
10 10 Delivered mails. 11. 00 Landed passengers baggage &c
Merdn Light Winds and fine clear weather

R M Steamship Java, E. R. Moodie, Esq., Commander, From Liverpool lying at Boston. Wednesday July 3rd 1867 wind S E; barometer 30. 25; thermometer 84

REMARKS.

Commenced with light winds & clear Wr.
9. 30 Hove short
10 R. M. S "China" proceeded homeward bound
11 Fast to end of Dk 2. 30, moored Ship in Co'y Dock
Crew Empd as requisite

274 *Deposition of Edwin R. Moodie, taken before me, Winslow Warren, Jr., U. S. Commissioner.*

Direct examination by W'm G. Russell, esq., proctor for claimants:

APRIL 16, 1870.

Int. What is your name—was your deposition taken in this cause for the trial in the district court?

Ans. My name is Edwin R. Moodie—my deposition was taken for that trial.

Int. 2. In what employ have you been since you gave that deposition, in what ships, and in what capacity?

Ans. In the Cunard service, in command of the "Java" and the "Cuba."

Int. 3. How long were you in command of the "Java" in all?

Ans. About two years and a half, beginning in 1865, the second voyage she made.

Int. 4. What was her first voyage to Boston?

Ans. In November, 1866.

Int. 5. Where was she July 2, 1866?

Ans. In New York.

Int. 6. Were you on board the "Java" July 2, 1867, and did she arrive at Boston on the evening of that day?

Ans. I was on board of her. She did arrive at that time.

Int. 7. Did the "Java" go to her dock that night?

Ans. No.

Int. 8. Why not?

Ans. Because the "China" was in the dock.

Int. 9. Where did the "Java" go that night?

Ans. She anchored in the stream.

Int. 10. What reason had you for anchoring in the stream?

Ans. Because we couldn't get into dock, and the "China" was coming out next morning, and then we would take her place.

Int. 11. Had you any other reason for coming to anchor than that you have stated?

Ans. No.

Int. 12. Did you or not anchor the "Java" that night in order to avoid collision with any other vessel?

275 Ans. No.

Int. 13. When first did you hear any statement that your ship on that night was in danger of collision with any vessel?

Ans. When I came here yesterday.

Int. 14. Where were you stationed that night in coming up the harbor, and at the time you anchored?

Ans. On the bridge.

Int. 15. Did you see any vessel with which you were in danger of collision?

Ans. No.

Int. 16. State whether or not on that night you brought the "Java" to anchor while she was going ahead at the rate of two knots per hour, or above or about that rate.

(Objected to, as leading.)

Ans. No.

Int. 17. State whether your recollection of anchoring the "Java" that night is distinct or otherwise.

Ans. Yes, sir, it is.

Int. 18. What, if anything, renders it distinct?

Ans. It was the first and only time the ship ever anchored here, when I was in command of her.

Int. 19. State how, and under what circumstances she came to anchor.

Ans. Her head was up stream and she was dead stopped; her engines were reversed so that the way of the ship was entirely stopped—had a little sternway at the time the anchor was let go—being flood-tide she swung to her anchor in a few minutes, and brought up in that way.

Int. 20. What, in your opinion, would be the effect of bringing the "Java" to anchor while she was going ahead at the rate of two knots per hour?

Ans. She would be very apt to part her cable or do other mischief.

Int. 21. State whereabouts in the harbor you came to anchor with the "Java" that night; where in relation to the East Boston ferry.

Ans. We anchored above the ferry a considerable distance, between Union wharf and Battery Point—in the stream.

276 Int. 22. Examine the photograph now shown you, marked "W. W. Jr. 3," and state what it represents, and what you know of it.

(Use of photograph objected to.)

Ans. The photograph was taken the morning after we anchored, while we were laying in the stream. It is a photograph of the "Java." She was lying where we anchored her the night before; hove short.

Int. 23. State whether or not at the time of the collision with the "McCloskey," in November, 1866, at the time you discovered the "McCloskey," it would, in your opinion, have been practicable or proper for the "Java" to have anchored?

Ans. I do not think it would have been practicable or proper.

Int. 24. State the reasons for your opinion.

Ans. In the first place I think that the way the ship had on, if we had attempted to check her with the anchor, it would have parted the cable, and we were too near the school-ship to attempt anything of that kind; if we had given the ship cable to have let her run ahead a bit, she must have sheered into the school-ship, and then there was danger of her overrunning the anchor; if we had dragged the anchor out of the channel, which I think would very likely have been the case, we might have endangered our own ship's bottom.

Int. 25. State whether or not at the time of the collision your anchor was in readiness to be let go.

Ans. Yes.

Int. 26. State whether or not you have examined the log of the "Java" for July 2 and 3, 1867, and whether the entries therein made are correct.

(Objected to, as leading, and as introducing incompetent testimony.)

Ans. I have examined it—it is now before me, the entries are correct.

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Ans. On the bridge.

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Ans. No.

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Ans. Yes.

Int. 26. State whether or not you have examined the log of the "Java" for July 2 and 3, 1867, and whether the entries therein made are correct.

(Objected to, as leading, and as introducing incompetent testimony.)

Ans. I have examined it—it is now before me, the entries are correct.

Cross-examination by R. H. Dana, jr., esq., proctor for libellants:

Cross-int. 1. How many times have you come up Boston Harbor in command of a Cunard steamer?

Ans. I don't know—I should think a hundred times.

Cross-int. 2. Within how many years?

Ans. Within seventeen years.

277 Cross-int. 3. How many of these times have you come up after dark, as near as you can tell?

Ans. About half of them.

Cross-int. 4. In how many of these times have you come to anchor before going into dock?

Ans. Not more than four or five times.

Cross-int. 5. Can you tell when, and in what vessels you did go?

Ans. Principally in the paddle-wheel ships—I can't tell the names of the vessels.

Cross-int. 6. Can you remember the dates?

Ans. No.

Cross-int. 7. Can you state the circumstances as to tide, wind, place, etc., of each or any one?

Ans. Yes, I can on occasion of the "Java's" anchoring.

Cross-int. 8. Can you as to any other than the "Java?"

Ans. I remember once, also in the "Arabia," very well—those are the only two that I can tax my memory with.

Cross-int. 9. State the circumstances of coming to in the "Arabia," time, tide, wind, place, etc.

Ans. It was at six o'clock in the morning, fine clear morning; we had to anchor in consequence of the dock being occupied by the outgoing ship, flood tide, and very litle wind; the place was above the East Boston Ferry.

Cross-int. 10. How near to your dock did you come to anchor?

Ans. About half a mile from it.

Cross-int. 11. In what direction did your dock bear from the "Arabia" after you got still?

Ans. I should require to have a chart to tell you that.

Cross-int. 12. Do you mean half a mile on a line from your dock across the channel?

Ans. From the dock to the ship I should suppose—I don't mean directly abreast of the ship, but in a direct line from the dock to the ship.

Cross-int. 13. Suppose a straight line drawn from your dock directly across the channel to the opposite point in the city, how much were you above that?

278 Ans. I can't tell.

Cross-int. 14. Why can't you remember the other instances?

Ans. It's so long ago.

Cross-int. 15. Have you read Mr. Brown's deposition as to coming to anchor, or had it read or stated to you?

Ans. Yes.

Cross-int. 16. When?

Ans. Yesterday.

Cross-int. 17. Have you read Mr. Lunt's deposition, or had it read to you? When?

Ans. No.

Cross-int. 18. Was Mr. Lunt in charge of the "Java" as pilot, when she came to?

Ans. I believe so.

Cross-int. 19. Suppose the "Java," with an ebb tide, coming up first

slowing and then reversing her engines, and light wind, can she not be brought to without serious danger?

Ans. Not until she is stopped; I never tried it or ever would, unless the way of the ship was stopped, with any ship that I have ever commanded.

Cross-int. 20. Suppose she has her engines reversed and a head tide, and has nearly come to a stop, is there not any rate less than a dead stand-still, at which to prevent collision you would drop an anchor?

Ans. No.

Cross-int. 21. Did you think of dropping anchor at the time of this collision?

Ans. No.

Cross-int. 22. I mean, did you give a thought to the question of dropping or not dropping anchor?

Ans. Everything was done that could be done, and by dropping an anchor it would only have made matters worse.

(Objected to as not responsive.)

Cross-int. 23. Please answer my previous question.

Ans. If letting go an anchor would have done any good it would have been let go; our anchor was ready at a moment's notice.

(Objected to as not responsive.)

279 Cross-int. 24. Please answer the question put to you—the twenty-second cross-interrogatory?

Ans. (The interrogatory being re-read to him, the witness answered,) Yes.

Cross-int. 25. Please state what you thought about it?

Ans. It could not do any possible good; it might have done a great deal more harm.

Cross-int. 26. At what stage of events did this thought about the anchor come into your mind?

Ans. As soon as we saw the vessel—that she was coming down, and there was likely to be a collision.

Cross-int. 27. Did you speak to the pilot about it?

Ans. No.

Cross-int. 28. Did he to you?

Ans. No.

Cross-int. 29. At what rate were you going over the ground when the thought crossed your mind?

Ans. I suppose about a knot.

Cross-int. 30. Do you say that going over the ground about one knot, with engines reversed and a head tide, it was unsafe and improper to let go an anchor irrespective of the school-ship?

Ans. Yes, I consider it so.

Cross-int. 31. How much water was there under your keel at that time?

Ans. I don't know.

Cross-int. 32. State as near as you can.

Ans. Probably four or five feet.

Cross-int. 33. Suppose the school-ship out of the way, could you not have dropped an anchor in that state of things and, with aid of tide and engines, brought her to without injury to her?

Ans. I think not.

Cross-int. 34. With a tide directly ahead, she would not have swung, would she, on letting go an anchor?

Ans. I don't understand what you mean by swinging.

Cross-int. 35. Would she not [t]ail down stream under such circumstances?

280 Ans. Letting go an anchor, if the anchor brought her up and didn't part, of course it would.

Cross-int. 36. If the chain parted, what injury would it have done to the "Java?"

Ans. Before it parted, it might have sheered her either one way or the other, into the school-ship for instance.

Cross-int. 37. Supposing the school-ship out of the way what injury would the parting chain have done to your vessel?

Ans. The parting chain wouldn't have done any injury to the vessel.

Cross-int. 38. How far were you from the school-ship when you thought about letting go an anchor?

Ans. I suppose about—I never thought of letting go an anchor—under a hundred feet, when the thought crossed my mind.

Cross-int. 39. If you were three hundred feet from the school-ship, and a head tide, you going over the ground about one knot, with engines reversed, would there have been danger of swinging into her?

Ans. Yes, sir.

Cross-int. 40. What were your means of paying out chain and nippering, in the "Java?"

Ans. Paying out round the bollard head—the anchor bits—and with a patent stopper that we have to stop the chain at once, at a link.

Cross-int. 41. How much chain was overhauled forward of the bits at the time?

Ans. None—we don't need it in these—the stopper being up, the anchor takes all the chain it wants until it is nipped; we have one turn of chain round the bits.

Cross-int. 42. Did you come to anchor twice on the night you speak of?

Ans. No.

Cross-int. 43. The place for the chief mate in coming up is on the forecastle, is it not?

Ans. Yes.

EDWIN R. MOODIE.

281 Circuit court of the United States, first circuit and district of Massachusetts.

THE JUDD LINSEED AND SPERM OIL CO., libellants,
vs.
THE STEAMSHIP "JAVA."

I, Winslow Warren, jr., United States Commissioner, hereby certify that on the 17th of February, 1869, appeared before me Charles L. Gardiner; on March 5th, 1869, Edward C. Gardiner; on March 6th, A. A. Fengar; on Sept. 3rd and 6th, Elbridge G. Martin; on Sept. 14th, A. F. Hayden; on Sept. 21st, Maxwell Reed and Samuel C. Martin; on Feb. 9th, 1870, John T. Gardiner; Feb. 10th, 1870, J. G. Lowell; Feb. 17, 1870, John Low; April 6th, 1870, W'm T. Browne; and April 16th, 1870, Edwin R. Moodie—witnesses on behalf of the respondents in the above case, and having been by me first carefully cautioned, examined and sworn to testify the whole truth in the cause aforesaid, gave the foregoing depositions, which were reduced to writing in presence of the witnesses by me or by William Hedge, esq., acting as my clerk by agree-

ment of the parties, subscribed by them in my presence, and carefully read over to them. The depositions were taken under the fiftieth rule requiring the evidence upon admiralty appeals to be by depositions, and the adverse party were duly represented at the time they were taken by Richard H. Dana, jr., esq., or Lewis S. Dabney, esq., their counsel.

In testimony whereof I have hereto set my hand and seal this eighteenth day of April, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.]

WINSLOW WARREN, JR.,
U. S. Commissioner.

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283 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of the Judd Linseed and Sperm Oil Company, libellants and appellants, *vs.* the steamship "Java," claimants, respondents, and appellees, in this court determined, including all the evidence used at the hearing of said cause.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court at Boston, in said district, this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

[SEAL.]

JOHN G. STETSON, *Clerk.*

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285 Know all men by these presents, that we, James Alexander as principal, and David H. Blaney as surety, both of Boston, in Massachusetts, are held and firmly bound unto the Judd Linseed and Sperm Oil Company in the full and just sum of five thousand dollars, to be paid to the said Judd Linseed and Sperm Oil Company, its certain attorney or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at a circuit court of the United States for the first circuit, held at Boston, in the district of Massachusetts, in a suit depending in said court between the Judd Linseed and Sperm Oil Company, libellants, and the steamship Java, whereof James Burns, John Burns, and Charles McIver are claimants, a decree was rendered against the said Java, and said claimants, and the said claimants having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Judd Linseed and Sperm Oil Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now the condition of the above obligation is such, that if the said claimants shall prosecute their said appeal to effect, and answer all

damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JAMES ALEXANDER. [L. S.]
DAVID H. BLANEY. [L. S.]

Signed, sealed and delivered in presence of—
W. G. RUSSELL.

Approved:

G. F. SHEPLEY,
Judge U. S. Circuit Court First Judicial Circuit.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 346. Massachusetts C. C. U. S. The Steamship "Java," &c., James Burns, John Burns, & Charles McIver, claimants, appellants, vs. Judd Linseed and Sperm Oil Company, lib'ts. Filed 7th December, 1870.

Supreme Court of the United States.

No. 145.

DECEMBER TERM, 1871.

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APPELLANTS,

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JUDD LINSEED & SPERM OIL CO.,

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BRIEF OF COUNSEL FOR APPELLANTS.

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That precaution on the part of the steamship must be seasonable	3
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Position of school ship in channel as shown by chart . . 8

Course of schooner 8

Course of steamer 8

Neither vessel seen by the other till collision inevitable . . 9

That the school ship concealed each vessel from the other . 9–10

This fact also determines the course of the two vessels . . 9

A.

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(*a.*) Her lookout was sufficient, well stationed, vigilant . 11–13

(*b.*) The schooner was not discovered, because without canvas, and in range of the school ship 13

(*c.*) She was seen as soon as visible 14–17

B.

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I.

The Cunard steamships are not excluded from taking their course inside the school ship by *non user* 17–37

(*a.*) Usage of Cunarders not to take that course is inadmissible in law 18

(*b.*) *Non user* by Cunarders is not proved 18–24

Positive proof of frequent use by Cunard ships . . . 20–22

(*c.*) *Non user* by Cunard ships is immaterial 18–24

Constant use by all other steamships proved 23–24

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(*a.*) The channel inside the school ship is, *per se*, a proper channel for such a ship 25

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Attempt to change heading of the school ship so as to obstruct the channel, refuted 25–27

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Their chief witness, Captain Matthews, says it is not so, if taken as the Java took it 28–29

Their other witnesses found their opinion on error in fact . 29–30

(*c.*) That the course inside is safe and proper is shown,

(1.) By its frequent use by all classes of steamships . . 30

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(3.) That with vessels lying ahead of the school ship, as at the time of the collision, it was the only safe and proper course, is proven by the same witnesses 31

Testimony is cited of

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Supreme Court of the United States.

DECEMBER TERM, 1871.

THE JAVA.

JAMES BURNS & AL., CLAIMANTS, APPELLANTS,

vs.

JUDD LINSEED AND SPERM OIL CO., LIBELLANTS.

BRIEF OF APPELLANTS.

This is a cause of collision brought by owners of the cargo of the schooner James McCloskey against the steamship Java, one of the Cunard line of steamers, for a collision which occurred in Boston harbor November 7, 1866.

In the District Court for the District of Massachusetts, upon a full hearing of the cause, a decree was entered for the claimants. Upon appeal to the Circuit Court, where the cause was heard both by the Circuit Judge and by the Associate Justice of this Court for the circuit, upon the same proofs now presented by the record, the decree of the District Court was reversed; and from that decision this appeal is taken.

The opinions delivered by Judge Lowell in the District Court and by Judge Shepley in the Circuit Court are appended to this brief.

Although this cause could in no event be considered as coming within the doctrine or the intimation of this Court in the case of *The Hypodame*, 6 *Wall.* 216, inasmuch as the District Court and the Circuit Court have here arrived at different conclusions.

yet the appellants might well feel a reluctance at burthening this Court with the labor of reconsidering facts which had been fully submitted to, and deliberately considered by the high authority from which the appeal is taken.

But it is apparent, upon perusal of the opinions delivered in the Courts below, that the difference in the results there reached, has not been upon questions of fact, but purely upon a question of law; and it will be found that in the discussion of this case upon the testimony, with a single exception, and that upon a question of fact assumed rather than determined, the appellants take no objection to any substantive and material fact found by the Circuit Court, in the opinion pronounced by Judge Shepley.

The question which we desire to present is whether upon the facts, substantially, with the single exception referred to, as found by both the Courts below, the collision which is the subject-matter of this cause was the result of *inevitable accident;* and upon that question the appellants, believing that they are not concluded upon principle, or by any decision of this Court or other authority, respectfully ask a hearing.

If the contest made by the libellants to establish facts against the Java not found in either of the courts below, shall necessarily involve a discussion of the conflicting testimony usual in an admiralty cause, we must plead that this too is inevitable, and not to be attributed as a fault to the Java or her counsel.

I.

Rules of Law.

The claimants in maintaining the proposition that, upon applying to the facts in this case the true rule of law, the collision will be found to have occurred by inevitable accident, admit to the fullest extent the obligations imposed upon steamships by the statute law and by the decisions of the admiralty courts, and

especially and stringently enforced in the recent decisions of this court.

(1.) That by statute regulation, "if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship."

13 Stat. at Large, 60; 1864, Ch. 69, Art. 15.

(2.) That under this statute regulation, as well as under the general rules previously established by the admiralty decisions, the steamer is required, in approaching a sailing vessel, to take the necessary measures to avoid collision; and that if a collision occurs, and is not shown to be inevitable, the steamer is *primâ facie* in fault.

St. John *vs.* Paine, 10 How. 557.
The Genesee Chief, 12 How. 443.
The Oregon, 18 How. 570.
S. S. Co. *vs.* Rumball, 21 How. 392.
The Vanderbilt, 6 Wall. 225.
The Carroll, 8 Wall. 302.
The Governor, 1 Cliff. 93.

(3.) That the precautions to be observed by a steamer, "in order to be effectual must be seasonable; and if they are not so, and a collision ensues because they are not adopted earlier, it is no defence to show that they were adopted as soon as the necessity for the precaution was perceived, nor to prove that at the moment of the collision it was too late to render such precaution of any service."

The Johnson, 9 Wall. 146.
The Governor, 1 Clifford, 93.
The Virgil, 7 Jur. 1174.
The Juliet Erskine, 6 N. of C. 634.

(4.) That especially in entering or leaving port, a steamer

is bound to the utmost degree of vigilance and caution in order to avoid collision with the vessels there at anchor, or under way.

Culberston *vs.* Shaw, 18 How. 584.
The Russia, 3 Mar. Law Cas. 290.

(5.) That where by statute regulation, or by custom long established, one side of a channel is used by vessels ascending, and the other side by vessels descending, a steamer departing from the usual course is in fault for such departure, and liable for a collision which occurs by reason of it, although the darkness of the night contributes to the accident.

The Roanoke, 19 How. 241.
The Fyenoord, Swabey, 374.
The Falkland, B. & Lush. 204.

But admitting the binding force of all these rules thus established, we contend that it is equally well established, —

(1.) That the statute regulations and the rule of the admiralty courts imposing upon steamers the obligation to avoid sailing vessels do not apply except in cases where the vessels are in sight of each other in time to avoid the collision, *provided their failure to see each other earlier results from no fault or omission on the part of the steamer.*

Peck *vs.* Sanderson, 17 How. 178.
S. S. Co. *vs.* Rumball, 21 How. 372, 385.
Bently *vs.* Cayne, 4 Wall. 509.
The Morning Light, 2 Wall. 550.
The Governor, 1 Clifford, 93.
The City of New York, 1 Clifford, 75.
The Buffalo, Newb. 115.
The Wings of the Morning, 5 Blatch. 15.
The Scotia, 7 Blatch. 308, 334, 339.
The Ebenezer, 2 W. Rob. 206.
The Itinerant, 2 W. Rob. 236.

(2.) That the rule which holds the steamer *primâ facie* in fault for not avoiding a collision with a sailing vessel, does not preclude proof that in fact she exercised in due season all possible precaution and skill, or that degree of caution and skill which the circumstances required and admitted; and that upon such proof she is exempt from liability.

The Grace Girdler, 7 Wall. 196.
The Scotia, 7 Blatch. 308.

(3.) That upon the authorities, and making the distinction between sustaining the burden of proof and a *primâ facie* case, until fault be proved on the part of the steamer in bringing the vessels into danger of collision, the burthen of proof is, throughout, upon the libellant to show that the collision was from the misconduct or negligence of the vessel sought to be charged.

Pritch. Adm. Dig. Damages, 1, 1, 66 to 87.
Parsons Ship & Adm. 529, and cases cited.
The Bolina, 3 Notes of Cases, 208–210.
The London, 11 Moore, P. C. 312.
The George, 4 Notes of Cases, 161.

(4.) That, whatever be the rule as to the burden of proof, a steamer is not to be held liable for a collision which cannot be attributed to any act or omission on her part which under the circumstances the court can condemn as a fault; and if it be affirmatively proved, that from the earliest period at which caution and skill can be required or exercised, down to the fact of the collision, she has exercised in every particular that degree of caution, diligence, and skill which the circumstances of the case require, she is exempt from liability.

The judicial definitions of "inevitable accident," affirmative and negative, are already numerous; we do not propose a new one.

But whether this Court shall adopt the earlier definition of

Dr. Lushington in *The Virgil*, 2 *W. Rob.* 201–204, "that which the party charged with the offence could not possibly prevent by the exercise of *ordinary* care, caution and maritime skill"; or that given later in *The Lochlibo*, 3 *W. Rob.* 310–315, "when both parties have endeavored by every means in their power with *due* care and caution and a proper display of nautical skill to prevent the occurrence of the accident," adopted by this court in *Union S. S. Co.* vs. *Va. S. S. Co.* 24 *How.* 313; or the more elaborate definition given in *The Europa*, 14 *Jurist*, 627, and adopted by this court in *The Grace Gridler*, 7 *Wall.* 196–203, "where a man is pursuing his lawful avocation in a lawful manner, and something occurs which no ordinary skill or caution could prevent, and as the consequence of that occurrence an accident takes place," "*The caution which the law requires is not the utmost caution that can be used. It is sufficient that a reasonable precaution be taken such as is usual and ordinary in similar cases; such as has been found by long experience in the ordinary course of things to answer the end; the end being the safety of life or property*": or even if this court should enforce the most stringent limitation to exemption by inevitable accident as maintained in the dissenting opinion in *The Grace Gridler*, 7 *Wall.* 196; in either case, and upon any rule of law yet laid down, the steamer is entitled to this defence upon affirmative proof that the collision occurred, notwithstanding she was at all times and in all respects in the exercise of the highest degree of care and skill, by reason of an event which she could not be reasonably required to anticipate, or to guard against.

Error alleged in decision of Circuit Court.

The appellants contend that the Circuit Court erred: —

1st. In misapplying the rule of law, and holding the Java liable for a collision which occurred while she was pursuing a course which she chose without fault and pursued with all possible vigilance, caution, and skill, merely because the result

showed the *possibility* of danger, without regard to the antecedent *improbability* that such danger would be met, or the caution and vigilance used to determine whether it was probable: or,—

2d. In assuming as a fact that the danger which actually occurred, and is therefore demonstrated as *possible*, was one which might reasonably have been anticipated as among the probabilities by which her course should have been determined.

We respectfully submit, that the proposition that a ship may without fault take a certain course, and pursuing it with the extremest degree of care, vigilance, and skill, may nevertheless be held liable for a collision which results from her so taking it, or rather which would not have resulted had she not taken it, is at variance with the universal rule of law which limits the plaintiff's right of recovery to a breach of obligation on the part of the defendant.

See *infra*, pp. 69, 70, 71.

And upon the question of fact we claim to show that under the circumstances of this case the probability of the occurrence of what actually occurred, was too remote to affect the course of the Java or to subject her to the charge of fault.

See *infra*, pp. 47–53.

II.

The facts showing caution, vigilance, and skill on the part of the Java, although they are in the main found in her favor by the Circuit as by the District Court, have not heretofore been admitted by the counsel for the libellants; and we suppose ourselves again called on to defend in all particulars against the charge in the libel that the "steamship caused this collision by not seasonably altering her course, and by not seasonably stopping and backing her machinery, and by her unusual and venturous navigation, or by one of or more said faults."

And this necessarily involves a review of the questions of fact, and of the testimony bearing upon them.

Facts not in Dispute.

Although the testimony in this case is voluminous, and the witnesses differ as usual in cases of maritime collision in regard to many of the details of the occurrence to which they testify, yet as to the main facts of the case there is not the usual controversy.

It is not in dispute, that the collision occurred in the harbor of Boston on the 7th of November, 1866, at about 12.30 P. M., in fine, clear weather, the tide being about one hour's ebb, and the wind blowing a three or four knot breeze from the west.

The Massachusetts school ship George M. Barnard, a vessel of about nine hundred tons, and high out of the water from being light, was at her usual moorings in the channel, heading to the westward and tailing down the harbor with the tide, and her exact position is determined by the plan of Mr. Boschke, introduced by the libellants; the same plan accurately shows the depth and width of the channel on each side of her, and the bearing of the wharves and docks of the harbor.

The schooner James McCloskey had been towed out by a steam tug from one of the wharves at East Boston, near the dock of the Cunard steamships, into the stream at some distance above the school ship, intending to get under way and to proceed to sea down the harbor. Her foresail was partly hoisted, and she was passing down inside the school ship, that is between the school ship and East Boston, when she discovered the steamship Java, with which she came into collision. She was a schooner of about one hundred and twenty-one feet in length, drawing eight feet of water.

The Java, a first-class propeller of the Cunard line, of twenty-seven hundred tons, three hundred and sixty feet in length, and drawing nineteen feet of water, coming up the harbor on her voyage from Liverpool, had passed through the narrow entrance to the harbor, called the "Upper Middle," and thence pursued her course up the mid-channel to a point which

the witnesses on both sides designate as opposite the Slate Ledge Buoy, which is almost exactly half a mile below the school ship, and there took her course so as to pass close by the stern of the school ship, leaving her on the larboard hand, so as to go inside the school ship to her dock at East Boston.

Neither vessel was seen by the other until each came out in sight to the other from under the stern of the school ship, at which time the schooner was about abreast of the school ship's bow, and the steamer's bow had not come up with the school ship's stern.

The steamship, at the time she was discovered, was heading directly for the schooner. The helm of the schooner was put hard to starboard; and the engines of the Java, which had been previously stopped, were reversed, and her helm put hard to starboard; but the steamer struck the schooner abaft her main rigging, and damaged her and her cargo.

The collision was off the starboard quarter of the school ship.

Thus far, it is believed, there is no controversy between the parties; although the exact distance of the two vessels from the school ship at the time of the collision; the rate of speed of each; the angles at which the several vessels were heading; the amount of change in the course of the steamship; the extent to which the schooner was under steerage way, or drifting with the tide and wind; and the time at which each of the two vessels starboarded, and the steamer "reversed," may be matters in dispute.

The leading and controlling fact in the case, however, which is set up by both parties, and relied on by both, is that up to a point very briefly preceding the collision, the school ship intercepted each vessel's view of the other for a very considerable period of time, and a very considerable space upon the water. This fact evidently determines, within exceedingly narrow limits, the courses of the two; and the exact location and bearing of

the school ship being fixed, the lines of the courses of the two colliding vessels prior to their discovery of each other may be almost mathematically demonstrated upon the chart; so that this part of the case also is to a great extent relieved from the difficulty ordinarily arising from conflicting testimony.

Although the libel does not allege the inability of the schooner to discover the steamship by reason of the interposition of the school ship between them; yet the testimony of the master and the mate, who are the only competent witnesses for the libellants upon this point, is clearly to the effect that this was the sole cause of their neglect to see the steamer until just before the collision.

E. Crowell, 16, p. 49; cross 32, 33, p. 54. P. T. Crowell, 39, p. 57.

And the testimony of the witnesses on board the Java is still more strong and clear, that the interposition of the school ship was the sole cause of their failure to discover the schooner.

Browne, 15, p. 82. Moodie, 25, p. 96.
C. L. Gardiner, 17, p. 107. Martin, 17, p. 129.
Coffin, 23, p. 103.

This testimony is confirmed by that of two competent observers outside the vessels, so situated as to be able to judge of the fact, and actually forming their judgment at the time.

E. C. Gardiner, 8, p. 114. Fengar, cross 10, p. 123.

The fact being thus proved and unquestioned, that neither vessel discovered the other till the collision was imminent, if not inevitable, and that this failure to discover each other was by reason of the intervention of the school ship, we contend that there is imposed upon the libellants the burden of showing negligence or fault on the part of the steamer in one or more of three particulars, viz.: —

1. That she was negligent in not discovering the schooner at an earlier moment, in season to avoid the collision. Or,

2. That she improperly took such a course of navigation as rendered her in fault for not seeing the schooner, and thus bringing her into danger of collision. Or,

3. That she did not use proper measures and due diligence and skill to avert the collision, after discovering the schooner and the imminence of the danger.

To these points the testimony on both sides has in fact been directed; and it is, perhaps, of little consequence whether a *primâ facie* case exists, or whether the burden of proof lies on one side or the other.

On the part of the steamer we deny that either of the three allegations in any form is sustained; and claim that, if the burden is upon us, we have sufficiently disproved them.

And we allege that if fault is attributable to either party, the schooner was in fault,—

1st. For not discovering the steamer earlier:

2d. For allowing herself to be concealed by the school ship while she was in motion, without being under canvas so as to be discoverable, or under steerage way so as to be in condition to avoid the collision:

3d. For not taking prompt measures to avoid the collision after it became imminent.

A.

There was no want of due precaution on the part of the steamer in not discovering the schooner sooner than she did.

(*a.*) The lookout on board the steamer was ample, was properly stationed, and was vigilant.

The first officer was himself on the lookout on the forecastle twenty-four feet above the water, with two men detailed for that special duty, and his whole watch of twenty men at hand.

Moodie, 5, p. 94. Browne, 3, 4, p. 80.

The competency of the first officer, Browne, will hardly be questioned. He had been seven years as master; eighteen months master in steamer service; six years in service of the Cunard Company; six voyages in the Java, and has since been in command in the same service.

Browne, 1, p. 80; 2 Browne, 2, p. 170.

That he was constantly on the lookout is shown.

Browne, 19, 20, 21, p. 82.

Int. 19. How constantly were you on the lookout for the last half mile of your course, before the collision?

Ans. I was on the lookout constantly. I am put on the forecastle for that purpose.

Int. 20. If the "McCloskey" had been in sight from the "Java," for the last half mile of your course before reaching the school ship, would you, or not, have seen her?

Ans. If she had been in sight, I certainly should have seen her.

Int. 21. Why can you answer with certainty?

Ans. Because I was on the forecastle for the purpose of keeping a lookout, and I saw the other schooner under canvas, and if the "James McCloskey" had had her canvas set, I should have seen her.

Besides the lookout, the master, Captain Moodie, and the pilot, Captain Martin, were upon the bridge of the steamer, a slightly more elevated position than the forecastle; and the Halifax pilot, Captain Coffin, was on the upper deck, all on the most careful lookout in entering the harbor and making their way to dock.

Moodie, 3, p. 94. Coffin, 5, p. 102. Martin, 8, 10, p. 127.

With such men as these in charge of such a ship, Captain Moodie, a master of fourteen years' standing in the Cunard service, Captain Martin, a pilot of twenty-nine years' service, and Captain Coffin, who had been twenty-three years pilot between

Boston and Halifax, all fully aware of the responsibility of their charge, and with nothing to distract their attention from their one object of bringing their ship to dock in safety, it would be superfluous to undertake to support by argument their positive statements that they were vigilantly on the lookout, and that they would not have failed to see this approaching schooner but for the fact that she was concealed from view by the school ship until she came in sight within one or two lengths from the steamer's bow.

(*b*) The proof is clear that the schooner, not being under canvas, could not be discovered over the school ship.

The same testimony is necessarily adduced to this fact as has been already cited to the fact that the school ship was interposed between the two vessels. The fact that she *was* not discovered by vigilant watching must stand for proof that she *could not* be.

Peck *vs.* Sanderson, 17 How. 178.

Upon the testimony, it is shown that the schooner, at the moment of the collision, had no other canvas than her foresail partly hoisted, and that it was not even then half-way up, though her crew were engaged in hoisting it when the steamer was discovered, so that up to that time there was still less of it to be visible.

It is true that the master of the schooner says the foresail was two-thirds up, and that his friend, Captain Nickerson, confirms his statement; but they are not supported by either of the Messrs. Nichols, witnesses for the libellants, and greatly relied on by their counsel, nor by the mate, who contents himself with saying that it was hoisted "part way." And this point would certainly have been pressed with these witnesses, if their recollection had been favorable to the libellants.

On the other hand, Mr. Jenkins, examined by the libellants, states that it was "about half-way up" (Jenkins, 9; p. 16); while the witnesses for the claimants all agree that it was less than that at the time of the collision.

Browne says, "not more than ten feet of the throat of the foresail was up." Browne, 28; p. 83.

Martin says, "about one-third the way up." Martin, 10; p. 127.

Fengar says, not over twelve or fifteen feet of the throat of the foresail; they had made the first hoist of the throat, and were making the first hoist of the peak." Fengar, 6; p. 121.

E. C. Gardiner. "It was not more than half-way up at the time of the collision." E. C. Gardiner, 8; p. 115.

C. L. Gardiner. "She had a small piece of her foresail set." C. L. Gardiner, 13; p. 107.

And these witnesses all concur in saying, that this small piece of foresail would not be perceived over the hull and house of the school ship; while the bare masts of the schooner in the range with the spars and rigging of the school ship would elude the sight.

This is the more obvious when it is considered that from the heading of the school ship and the courses of the two moving vessels, the masts of the schooner must have been very nearly in the range of the school ship from stem to stern, so that the ship's three masts and her entire rigging shielded them from view.

(*c.*) The testimony from those on board the steamer shows that the schooner was discovered at the earliest practicable moment, from the bridge and from the forecastle.

The first observed indication of the presence of the schooner, undoubtedly, was the pilot's observation of a moving object over the school ship's quarter, between her main and mizzen rigging, which proved to be the mast and a small piece of the foresail

of the schooner, — and almost simultaneously her jib boom appeared by the stern of the school ship.

Martin, 10, p. 127. Cross 17–22, 23, p. 133.

The first officer, Browne, discovered the steamer at almost the same instant.

Martin says: "There was hardly any difference between Mr. Browne seeing her on the forecastle, and myself and the captain. I think we saw her first on the bridge, the captain and myself. I instantly, as I said before, gave the order to turn back, and Mr. Browne instantly followed by singing out to the schooner to hard-a-starboard his helm. These orders were very close together; my impression is, that Mr. Browne gave that order to the schooner to hard a-starboard, instantly after the giving of my order." Martin, 11, p. 128.

Moodie says: "The pilot and myself, I think, saw the vessel first; but almost immediately afterwards the chief officer called out." Moodie, 22, p. 96.

Browne says: "I sang out for them on the schooner to starboard their helm. The pilot and Captain Moodie had seen the schooner off the bridge also, and, I believe, had ordered them to reverse the engines full speed." Browne, 13, p. 81.

Captain Coffin says: "I presume she was seen first by the captain and pilot; they being more elevated than any one else, could see over the school ship. I saw her within a few seconds of the time I heard the remark made there was a schooner there." Coffin, 22, p. 103.

Captain C. L. Gardiner, a passenger on board the Java, and a shipmaster of experience, after stating his position, "that he had as good a lookout as any one could have," having got upon a tier of cable so as "to look down on the school ship's deck," (p. 106), says, "I saw her just coming past the school ship's stern." (13; p. 107). And in answer to the inquiry by

whom she was first discovered, says: "What called my special attention to her was when I heard a cry of starboard from somebody, and reverse the engines was the order given by the bells."

This testimony is as full as such a case admits of, that the schooner was first discovered by the captain and pilot from the bridge, by observing the motion of the schooner's masts and fragment of sail as they came out of range of the school ship's masts over her quarter; and as would be the case from the acute angle at which the school ship and steamer were heading (as will be shown hereafter), that the jib-boom and bow of the schooner were almost instantaneously in sight past the school ship's stern, and were observed by the master, pilot and mate simultaneously, or nearly so, — the two being so near together that an intelligent and skilled observer on the watch, like Captain Gardiner, had heard the mate's cry of starboard before he realized the presence of the schooner.

To this testimony we add that of Captain Fengar, the Commander of the Revenue Cutter, who could only judge of the time when the steamer discovered the schooner by the positions of the three vessels, and by his observing the fact that the Java reversed her engines.

He says, in answer to the cross-interrogatories of the libellants' counsel, that the steamer did not in his opinion see the McCloskey until she reversed her engines: "She could not possibly have seen her from her position; she might possibly have seen her spars, but could not have told whether she was under way or at anchor." Fengar, cross-int. 10, p. 123.

And again he says that when the schooner was abreast the starboard bow of the school ship she could not have been seen from the Java except over and across the school ship. Fengar, cross 15, p. 124.

"The school ship being a very light vessel, and high out of water, and besides having a very high house upon deck, and the

schooner in that position being very near the ship when she was on her starboard bow, and the steamer several hundred feet at that time astern of the ship, there would be no chance for the pilot or officer in charge of the steamer to see the schooner." Fengar, cross 17, p. 124.

The judgment of so competent an observer as Captain Fengar, from his position in his open boat, watching the course of both vessels, and expecting a collision because he perceived that neither could see the other, is entitled to great weight upon the question whether the steamer discovered the schooner as soon as was practicable; his opinion being founded upon the action of the steamer, as observed by him, consequent upon the supposed discovery.

Upon this testimony we submit that the case on the part of the steamer is as fully maintained as such a case can ever be; that there was no negligence on her part in not discovering the schooner at an earlier point than she did discover her.

B.

The steamer was not in fault for the course which she took towards her dock, nor for the manner in which she pursued that course.

It appears from the opinion of the learned judges of the District Court and of the Circuit Court that the allegation to which most of the evidence and arguments at the former trials were addressed, was the allegation on the part of the libellants that the Java was in the wrong in attempting to pass on the inner, or East Boston, side of the school ship when and as she did; and that it is in this particular that the libel alleges unusual and venturous navigation on the part of the steamer.

To sustain this issue the libellants have attempted to prove,

1st. That there was a usage on the part of the particular line of steamers to which the Java belongs, the Cunard line, not to take this inside course.

2d. That it was unsafe and hazardous to take that course at the time and under the circumstances of this case, and in the manner in which the Java took it.

I.

(*a.*) To the evidence offered of usage, or rather to the point of *non user*, we objected; and we rely on the objection.

We submit that it is not competent to exclude from one of the main channels of the harbor of Boston one particular line or class of ships on the simple ground that they have neglected hitherto to use it.

Circumstances may change so as to render it desirable for them to adopt a new course; and it is evident that the introduction of long ships and of propellers instead of side wheels, has in this case rendered a change in the mode of approaching and entering their dock convenient if not necessary for this very line of steamers.

The evidence was admitted in the district court on the ground that "it might be material in ascertaining whether the schooner, in getting under way in that part of the channel, had any reason to expect to meet the steamer there, and so bear upon the diligence, or want of it, on the schooner's part"; but it was not, for reasons which will be obvious, found to be material; nor can it be so upon the evidence in the present hearing.

(*b*) The testimony wholly fails to support the allegation of usage or *non user*.

There are, it is true, some witnesses from on board the school ship who testify that up to the time of this collision they had never seen a Cunard steamship go up inside their ship at her moorings.

Two of them, Captain Matthews and Mr. Blaney, had been stationed on the ship about six years at the time of the collision; Jenkins and Pennington had been there but one year and eight

months, respectively. How full the opportunities of Captain Matthews and Mr. Blaney are for observing these ships; how much of the seven months while the ship is at her moorings, Captain Matthews may be absent on business of the institution of which he has charge, and what particular reason any of the witnesses have for observing whether the Cunard ships go inside or outside, we have no means of judging.

Captain M. B. Tower asserts that he thinks he sees one half the Cunarders that enter the port, and he never saw one which went inside the school ship.

This is the whole testimony in the case on the part of the libellant to this point which is entitled to *any* weight whatsoever.

Three other witnesses, indeed, testify that they never saw a Cunarder go inside, viz.: Horace Nickerson, Judah Baker, and James Kelly.

The force of their testimony upon this point certainly is entirely annulled by their statements, equally strong, that they never saw any of the other steamers take this course, which are shown by the concurrent testimony of all the witnesses to take it *frequently, and almost daily.*

Horace Nickerson says he never saw a Cunarder go inside. "No, sir, not one. *I never saw any steamer except a tug-boát.*" Nickerson, 13, p. 24.

Judah Baker says: "I don't recollect ever seeing any steamer go inside the school ship. I don't mean to include the City Deer Island steamer; she goes down every day through the Bird Island channel; she goes along shore." Baker, cross 33, p. 47.

James Kelly states that he does not recollect seeing any of the New York, Baltimore, or Philadelphia steamers pass up inside the school ship, or down either; nor any of the Portland, Bangor or Eastport boats. Kelly, cross 8, 9, p. 71.

Now, in view of the testimony as to the use of this passage by steamers other than the Cunarders, which will hereafter be

referred to, it will be no question for the Court what is the value of the testimony of Nickerson, Baker and Kelly upon this point of the case; but it will be a question, recalling what they state as to their means of observation and actual knowledge upon this point, whether their testimony upon all other points is not, as we say it is, equally worthless.

But confining ourselves to the reply to the negative testimony of the officers of the school ship, and Mr. Tower, as to the usage of the Cunard ships, we show their use of this passage in no inconsiderable number of cases by actual proof.

E. C. Gardiner has seen the Cuba and the China take it. Gardiner, 15, p. 115.

Captain Fengar has several times seen the English steamers go up inside. Fengar, 12, p. 122.

And these men have occasion to notice the fact, as they are accustomed in their official duty to intercept these steamers.

The six pilots, called by us as the most competent witnesses in this cause, and the harbor master of the port, testify that there is no rule or custom for the Cunard steamers to avoid this passage; and all the pilots but one have brought Cunard ships up inside the school ship or inside her moorings, and know of other cases besides their own, in which they have been so brought up.

E. G. Martin, 30, 31, p. 131. Hayden, 9, 10, p. 138.
Reed, 9, p. 144. S. C. Martin, 8, 9, p. 150.
J. T. Gardiner, 8, 9, p. 156. Lovell, 8, 9, p. 162.
Low, 8, 9, p. 167.

E. G. Martin, the pilot in charge of the Java, at the time of the collision says, "I have been in with the Cunard steamers myself, two going down and one up, including the 'Java' this time, and I know of other Cunarders going there."

Hayden. "I have been inside with steamers and sailing ships, also with Cunard steamships."

Reed. "I have seen Cunard steamers come up and go inside

of where the school ship lays, inside of the school ship. I have been up with the Cunard steamer 'Africa,' inside of the line of the school ship's moorings. The school ship was not there then I have never brought one up inside the school ship myself."

S. C. Martin. "I have been there in that track with two of them myself; the side-wheel steamer 'Canada' and the screw 'Cuba.' I believe the school ship was not there when I went with the 'Canada'; it was some years ago. I went up inside the school ship with the 'Cuba,' some four or five years ago. I have seen Cunarders going up that way often.

John T. Gardiner, harbor master for ten years, and formerly a pilot for sixteen years, says:—

Int. 8. [*De bene esse.*] State, if you know, whether there is any rule, custom or usage for the Cunard steamers or other steamers entering the harbor of Boston not to go inside the school ship at her moorings.

Ans. No reason whatever why they should not go in there, when there is water enough; the pilots are all governed by their own judgment. There is no such rule, or custom, or practice; all pilots are supposed to be governed by their judgment.

Jesse G. Lovell says, "I have also seen the Cunard steamers go inside."

Low says: I should think that I have been up inside the school ship on an average about one in five that I have piloted up of the Cunard steamers. I have seen other pilots bring up Cunard steamers inside.

It is not contended that the track inside the school ship is the ordinary track of the Cunard steamers, or as frequently used by them as the outside course.

There are obvious reasons why a small proportion of the whole number of the Cunard ships entering the harbor should go to their dock by this passage.

It is shown, in the first place, that their convenience requires them to go there only on the ebb tide; and this reduces the

chances of their taking the inside course to one half. Again, they would not be likely to take the narrow channel by night, and this reduces it to one quarter; again, it is not claimed that this channel is passable for ships of their draft at more than two hours' ebb, and this cuts off two thirds of the quarter; and finally, it is not claimed that this passage should be selected when other vessels are at anchor or under way in it sufficient to encumber it.

If for these reasons but one in twenty of the Cunard ships entering the port should avail themselves of this passage, it might be possible that for even six years they would escape the notice of Captain Matthews or Mr. Tower.

But there would be no forfeiture of the right to use this portion of one of the main channels of Boston harbor, by a line of ships to whose dock it directly leads, at such stage of the tide and under such conditions in other respects as render it their most safe and convenient mode of access.

(*c.*) The testimony from witnesses on both sides of the case as to the frequency with which this part of the channel is used by other steamers, which, though generally not of the same class and size, are sufficiently like the Cunard ships to produce the same effect upon the safety or danger of the passage for small sailing vessels, renders the evidence as to the usage of the Cunard line wholly immaterial.

It is shown that the New York, Philadelphia, Baltimore and New Orleans steamers, including propellers of 1,200 to 2,000 tons, and drawing from twelve to sixteen or twenty feet of water (the draft of the Java being less than nineteen feet), are frequently in the practice of using this passage inside the school ship in order to make their turn up the harbor to their docks; and that the lighter draft side-wheel Eastern boats constantly use it.

Matthews, 12, p. 9, says: "Philadelphia and Baltimore steam-

ers *generally* go up that way when the way is clear, — St. Johns and Portland boats frequently."

Blaney, cross 1, p. 14, says: "The New York and Philadelphia boats go occasionally"; which, in his answer to the 3d cross, he explains to mean "not always."

Jenkins, cross 26, 27, p. 19, says they go frequently, and "some of them are 2,000 tons."

E. C. Gardiner says the "New York and Philadelphia boats most always go up that way on the ebb tide; they draw fifteen or sixteen feet." Gardiner, 15, p. 115.

Captain Fengar says: "It is very common for our American steamers to make the sweep round to dock themselves on the Boston side, — the exception is rather the other way. I refer to the Philadelphia, Baltimore and New York steamers more particularly." Fengar, 12, p. 122.

The pilots all concur in testimony to the same effect.

E. G. Martin, 30, 31, p. 131. Hayden, 9; p. 138. Reed, 9, p. 144. S. C. Martin, 9, p. 151. Low, 9, 10, p. 167.

John T. Gardiner, the harbor master, says: "The Eastern steamers go inside, I should say, eight out of ten of them; the large steamers are governed by the tide, whether it ebbs or flows; I have seen a great many of the New York, New Orleans, Baltimore, and Philadelphia steamers go inside, and as many outside; they are governed by their chances of making their docks." I should think they would run all the way from twelve to nineteen feet draft; I should think they would be from 1,200 to 2,000 tons. John T. Gardiner, 9, 10, p. 156.

Jesse G. Lovell, United States Coast Pilot, who has piloted the steamers of these various lines, and was pilot of one of the Baltimore boats for two years and a half (see 3, p. 162), says: "I have been inside a great many times myself with steamers: I have been inside with the steam frigate 'Ammonusuc,' the

steamships 'Concordia,' 'Ladoga,' and 'Cortes,' and frequently with the 'William Jenkins,' when it was more convenient to make the turn. I have frequently seen the New York, the Baltimore, Philadelphia and the New Orleans steamers go inside. The 'Ammonusuc' is a ship of about 3,500 tons, with three hundred and seventy-five feet of keel, and drawing sixteen or seventeen feet. The 'Concordia' is 1,800 tons, drawing, I think, eighteen feet. The 'Ladoga' is 1,200 tons, drawing sixteen feet. As a general thing, the steamers of the regular lines from New York, Philadelphia, and New Orleans draw from sixteen to twenty feet loaded, and are from 1,100 to 2,000 tons." Lovell, 8, 10, p. 162, 163.

With this proof of the frequency with which the steamers of these lines, one of which was a daily line to New York, go up this inside track, of what consequence could it be to Capt. Crowell in the "McCloskey," whether he might reasonably expect to meet a Cunard ship there or not? And how can it be possible that regard to the safety of the smaller class of vessels requires that the Cunard line should be excluded from the right and opportunity, however rarely availed of, to take this course to its dock?

(*d.*) The testimony upon this point is rendered immaterial by the fact that it does not appear that Capt. Crowell, in getting under way in the manner he did, or in the diligence, or want of diligence and care which he displayed in doing so, was in any way affected by the consideration of his liability to meet a Cunard steamer.

He is a witness in the case, and the question is not put to him by the libellant.

II.

The inside passage was a proper course for the Java to take at the time and under the circumstances of this case; and she took that course in a proper and prudent manner, and with all due precaution.

(*a.*) That the channel inside the Java is, *per se*, a proper one for such a ship as the Java, is manifest from the character of the locality itself, as described by the libellants' witness, Mr. Boschke, and delineated upon his chart, which we accept as accurate.

The chart shows not only the exact position of the school ship at her moorings, but it also shows her exact direction and line of heading as determined by the set of the tide at one hour's ebb.

There is indeed an attempt made by the testimony of Mr. Tower and Judah Baker to show that at one hour's ebb the tide sets across Bird Island flats, which would cause the school ship to tail towards the north and east, and thus to diminish the width of the channel.

To show the worthlessness of Judah Baker's testimony upon this point, we refer to his answers to the 20th and 21st direct cross-interrogatories, p. 43.

Int. 20. Please do so.

[*Objected to, as above.*]

Ans. In order to avoid trouble, I should have swung the vessel off, away down in the channel, kept as close on the east side of the channel as possible, so as to bring the steamer on a line with the school ship, as nearly as might be, so that I could scan what difficulties might lie in my way, besides shoal water.

Int. 21. What would be the advantages to the steamer coming up and to other vessels, in her coming up on a line with the school ship, so as to scan, as you have said?

[*Objected to, as above.*]

Ans. No advantages that I know of, not so much as one, unless the

channel is crowded with vessels going up or down. [*To question repeated.*] My answer was given in answer to the question how I should manage my vessel, to go inside the school ship.

And then to his answers to the 19th and 20th and 27th cross-interrogatories, p. 46, 47: —

Cross-Int. 19. Read the twentieth and twenty-first direct interrogatories and your answer to the same, and state whether a steamer could come up the channel in a line with the school ship, as inquired of in the twenty-first interrogatory: and, if so, from how far below the school ship could she come up in that line? [*The twentieth and twenty-first interrogatories and answers were read to the witness.*]

Ans. Not three times her length, on an ebb tide; because I've told you all along, the ebb tide swings the ship on the flats, and to be on a line with the ships meant directly astern of her.

Cross-Int. 20. Is that what you understood Mr. Dana to mean by his question, interrogatory twenty-first?

Ans. I don't know as I can describe it any better than I have.

Cross-Int. 27. Supposing the school ship to tail as represented on that plan, from how far below could a steamer drawing nineteen feet come up in a line with her, without any obstruction from shoal water, at one hour's ebb tide?

Ans. I have repeatedly said, not three lengths. You see by the depth of water that she couldn't, because it's marked seventeen.

The absurdity of his proposition to bring up the steamship on a line with the school ship when he had already testified that the tide tailed the school ship directly upon the flats is demonstrated apparently to his own satisfaction; and his last answer referred to equally demonstrates his ignorance of the harbor which he professes to understand so thoroughly, inasmuch as by the help of an accurate chart he found only seventeen feet of water where there was actually, at the time of tide inquired, of thirty feet.

In answer to the twenty-first cross, he directly states, that Boschke's plan represents correctly the position and heading of the school ship at the time.

Cross-Int. 21. Examine the plan now shown you, and marked "Mr. Boschke's plan," and state whether in your opinion it correctly represents

the position and heading of the school ship, as she lay at the time you saw the "Java."

Ans. Well, to the best of my knowledge and belief, I should say it did.

His whole deposition will be found to be a like mixture of incongruity, assumption, and ignorance.

The statement of Mr. Tower is distinctly denied by almost every witness familiar with Boston harbor who has been called by us; all stating that the tide sets at the school ship as represented by Mr. Boschke, and that the Bird Island tide is only in the inner channel between the island and East Boston, as a mere inspection of the chart would indicate.

E. G. Martin, 27, 28, p. 130. Hayden, 7, p. 138.
Reed, 7, p. 144. S. C. Martin, 7, p. 150.
J. T. Gardiner, 7, p. 156. Lovell, 7, p. 162.
Low, 7, p. 167.

And thus Mr. Boschke is confirmed, if it can possibly be supposed confirmation is needed for a scientific witness called by the libellant, and testifying to a thorough study and six years' survey of the harbor.

The proof that the wind was a moderate three or four knot breeze from the west, as stated in the interrogatory to these several witnesses, or that it was to the north of west, which is more favorable to the respondents, is sufficient; and this is a fact assumed throughout in the libellants' cross-interrogatories.

The Court will then apply to the chart of Mr. Boschke his testimony, that the red line denotes twelve feet of water at extreme low water of the lowest tides, and that the soundings marked upon the chart are taken at the same stage of the tide, and that for one and a quarter hours' ebb, on the 7th of November, 1866, the actual depth is to be ascertained by adding *thirteen feet* to these soundings. Boschke, 5, 7, p. 79.

His chart and testimony demonstrate that there was, at the

time of the collision, a channel of three hundred and eighty-five feet inside the school ship, with twenty-five feet of water, and a channel of nineteen feet, the draft of the Java, five hundred and thirty-five feet in width. Boschke, 11, p. 179.

The figures show the rapid falling off at the line of six feet low water, and it may fairly be stated that the channel of 20 feet depth is 500 feet in width.

This is notoriously a wider channel than is to be found during a great part of the tide at Boston Narrows, though which, at all stages of the tide, the whole shipping of the port must pass.

(*b*) The testimony offered to show that the course inside the school ship is unsafe or venturesome for a ship like the Java is in itself exceedingly weak.

Captain Matthews (17, 18) states that under some circumstances it would be hazardous.

We claim that his answers to cross-interrogatories 3, 4, 6, 7, 8, and 9, p. 18, 19, entitle us to add his name to the list of those who testify that under the circumstances of this case the course pursued was proper and seamanlike.

Cross-Int. 3. Examine the chart herewith produced, marked "A., W. W., jr.," and the course marked thereon. State whether the course there marked is one which you would consider unseamanlike or hazardous for a steamer to take, if she proceeded slowly, the wind being west, or north of west, the tide one hour ebb, there being several vessels at anchor ahead of the school ship, and no vessel visible at anchor or under way between the school ship and East Boston wharves?

Ans. No. sir. I should think there would be no danger, assuming that to be the track, and the position of the school ship; it looks to me farther out than we lay.

Cross-Int. 4. Suppose a single vessel under way, to be seen by the steamer between the school ship and the East Boston wharves, would that alter your opinion as to the danger of taking that course?

Ans. I should proceed with more caution, of course, as I saw difficulty in the way.

Cross-Int. 5. You were examined as a witness at the former trial of this cause, were you not?

Ans. Yes, sir.

Cross-Int. 6. I find in my minutes of your former testimony this statement: "Even if vessels were in the way, I should not think it venturesome to go three knots an hour. Even with liability to vessels coming in, I should not consider it venturesome to run at an angle of four points with the school ship at three knots an hour." State whether that statement is a correct statement of your testimony, and whether it agrees with your opinion at the present time.

Ans. I don't think it would be risky; of course, three knots means through the water on an ebb tide. I don't recollect what my former testimony was.

Cross-Int. 7. In your answer to the seventeenth direct interrogatory, you speak of taking a short turn across your stern. State whether by that expression you refer to such a course as is shown in the chart "A., W. W., jr."

Ans. No, sir; I should not consider that a short turn.

Cross-Int. 8. State whether a course from the point denoted by the letter H in the word CHANNEL in that chart to a point just astern of the school ship would be what you would call a short turn, or a venturesome and hazardous course.

Ans. It is not what I should call a short turn, neither a hazardous course.

Cross-Int. 9. Answer the same question, placing the school ship where you suppose she ought to be placed upon said chart.

Ans. No, sir, I should not consider it a venturesome or hazardous course, going at three knots, on an ebb tide.

The Court will note that, although examined with reference to a chart (A., W. W. Jr.) upon which the position of the school ship is erroneously laid down, the attention of this witness, as of the others examined on our side, is called to the discrepancy, and their testimony is given with reference to the true position.

Mr. Blaney (16, 17, 18) testifies that he considers it risky to go inside, but gives his reason that "there are generally small vessels anchored in that way"; a reason which did not apply in the present case.

Judah Baker (18, 19) considers it imprudent, and gives his reason, viz.: that the tide sweeps across the flats and there is not sufficient distance between the school ship's stern and the flats, when she tails in that direction, to give a proper berth for

a large vessel to pass. This reason has been already disposed of. The Court has from Mr. Baker only the testimony of an incompetent witness founded upon a supposed fact which has no existence.

Captain Tower (12, 14) gives the same reason for his opinion, viz.: the narrowness of the channel, which he estimates, of course, on the same theory as to the tide, and also assumes that vessels are anchored in the way.

Horace Nickerson (19, p. 25) gives his opinion unasked; and to show the strength of his feeling, if not of his judgment, he also proffers his statement that he would not go there with his own vessel, drawing twelve feet; and goes on to illustrate his own ignorance by narrating the one case when with fear and trembling and anxious inquiry he passed the school ship's buoys, drawing twelve feet of water, with full fifteen feet more under his vessel's keel. See Nickerson, cross 45 to 51, p. 30.

(*c.*) To meet this slight and wholly inadequate testimony from men, no one of whom ever commanded or sailed a steamer, we have, —

1st. The evidence of the frequent use of this passage by all classes of steamers already referred to.

2d. Besides the officers of the Java, the testimony of ten witnesses, whose skill and competency is fully shown, and all of whom are familiar with the management of steamships, that this channel is a proper and safe one for the Java to take.

3d. The testimony of the same witnesses, that, under the circumstances of the case, so far from being hazardous or venturesome, it was the only safe and proper course for her to pursue to her dock.

1. We claim that the frequent use of this channel by other steamers is in law adequate proof of the propriety of its use.

It is to be presumed that in the long run those engaged in any lawful and proper department of business will regulate their mode of conducting it with due regard to the rights of

others. What is reasonable care may be inferred from what is ordinary or customary care.

Cass v. Lowell R. R., 14 Allen, 448.
Raymond *vs.* Lowell, 6 Cush. 524.
Frankford & B. T. Co. *vs.* Phil. & T. R. R. 54 Penn. 345.

2. The proof is superabundantly strong that with the tide at one hour's ebb, and the wind from the west, the proper and ordinary course of the Java in coming up the harbor to her dock in case the school ship were not in the harbor, would be just about over the mooring place of the school ship.

That with the school ship at her moorings, her proper course would be, to come up mid-channel from the Upper Middle heading for Commercial wharf shown on Boschke's plan until almost opposite Slate Ledge buoy, a point little more than half a mile below the school ship, and there to determine according to the position of the vessels in the harbor on the way to the dock, whether to go inside or outside the school ship, the preference being given to the inside course if free, owing to the greater convenience in docking by approaching the dock in that direction.

The same testimony is to be referred to, to show that upon the proved facts in this case, viz.: that there were several vessels at anchor ahead of the school ship and to the westward of her directly in her way to the dock if she should take the outside course, and that there were no vessels at anchor, and no vessels under sail visible, in the inside passage, *it was her only safe and proper course to go inside.*

Upon these points no less than five of the witnesses referred to, speak from full knowledge and observation of the facts as to the position of these vessels, viz., Captain Martin, Captain C. L. Gardiner, Captain E. C. Gardiner, Captain John T. Gardiner, and Captain Fengar.

The other five being pilots, summoned as the most competent experts, give their opinion upon the state of facts narrated by

these five witnesses and the officers of the Java as to the location and number of the vessels at anchor.

From the concurrent testimony of these ten competent experts we cite: —

C. L. Gardiner, a shipmaster of seventeen years' standing, who has commanded ships of the first class and one propeller, who was a passenger on the Java, and who closely observed her course and all the facts of the collision, says, p. 108: —

Int. 22. State whether or not, in your opinion, there was any rash or hazardous or venturesome navigation on the part of the "Java" in taking her course inside the school ship on her way to her dock.

Ans. No, nothing rash nor venturesome, nothing more hazardous than under ordinary circumstances in entering port.

Int. 23. State whether under the circumstances under which you were coming up the harbor, you would consider it proper to take the outside or inside course, and give the reasons for your opinion.

Ans. I should have gone inside, just as we did. In the first place there were several vessels lying apparently ahead of the school ship, and then again, by coming up under the school ship's stern we could stem wind and tide. There was nothing to be seen inshore except the vessel that went down outside of us; except for that the channel was clear.

E. C. Gardiner, lieutenant commanding in the revenue service, who saw the collision from the deck of his cutter, says, p. 116: —

Int. 16. [*De bene esse.*] In coming up Boston harbor with a steamer like the "Java," with the wind and tide as they were on the day of the collision, and with the vessels in the harbor as they were at the time of the collision, state what course in your judgment would be the proper course for the steamer to take in going to her dock at East Boston, — the course inside the school ship, or the course outside the school ship, and give the reasons for your opinion.

Ans. I should have come up inside of the school ship, and should consider that the proper course; the reason I have already assigned, there being vessels ahead of the school ship and abreast the steamer's dock, and coming up inside the steamer had the wind and tide ahead, and thereby was under perfect control. The course was clear of vessels inside, and she could have seen that when below, coming up; that is, it looked clear up to the moment she discovered this schooner.

Int. 17. Examine the chart now shown you and marked A., W. W., Jr. State whether, with a steamer like the "Java," with wind and tide and vessels as they were at the time of the collision, if you had reached the point denoted by the letter H, in the mid channel upon the chart, you would consider it rash or venturesome navigation to take a course inside the school ship, passing her stern at a distance of about one hundred feet.

Ans. I should not. I think the school ship should be placed farther to the eastward on the chart, but giving her her proper location, I should still say that the proper course would be inside.

Capt. Fengar, then commander of the revenue cutter, the most competent disinterested witness who saw the facts of the collision, says, p. 121, 122: —

Ans. I lowered my boat about the time the steamer changed her course, when she was at Slate Ledge. I was then about one mile from her; no, not a mile, about three-quarters of a mile.

Int. 8. State whether you observed anything at the time which would determine the course of the steamer, whether to go inside or outside of the school ship in going up to her dock.

Ans. There were, at the time the steamer changed her course, some half a dozen vessels ahead and outside the school ship, at anchor; those would interfere materially with her course to her dock if she went outside, particularly at that stage of the tide — there were no vessels inside. I had sent my boat to board some of those vessels that morning.

Int. 9. [*De bene esse.*] In coming up Boston harbor with a steamer like the "Java," with the wind and tide as they were on the day of the collision, and with the vessels in the harbor as they were at the time of the collision, state what course in your judgment would be the proper course for the steamer to take in going to her dock at East Boston, the course inside the school ship or the course outside the school ship, and give the reasons for your opinion.

Ans. I should most certainly take the course inside the school ship, and would consider that the proper one. My reason for doing that would be that I couldn't *safely* take the course outside across those vessels laying there, and make a sweep and lay my vessel alongside her pier. The way those vessels were situated you would have to go round them with the steamer, which would bring the wind and tide both on her port side, and there would be danger in making the landing without anchoring, and that would be a great annoyance and great trouble to a vessel like her. By taking the other course you would head wind and tide and make it very safe for a steamer like her to run directly to her pier and throw out the

lines, and there was nothing apparent on the inside course in her way. The schooner was not discoverable because she was drifting down in the range of the school ship's spars and masts, and having no canvas spread was not visible to the steamer. If she had been under canvas the schooner could have got out of the way, having steerage way and going to the eastward, and there would have been no difficulty in the steamer's going up.

Int. 10. [*De bene esse.*] Examine the chart now shown you, and marked A, W. W., Jr. State whether with a steamer like the "Java," with the wind and tide and vessels as they were at the time of the collision, if you had reached the point denoted by the letter H in the mid-channel upon the chart, you would consider it rash or venturesome navigation to take a course inside the school ship passing her stern at a distance of about one hundred feet?

Ans. I should consider that under the circumstances the only proper way to make the landing with that steamer; there is room enough inside the school ship, and the risk of going across her stern and having a vessel like this schooner come out from behind her was no greater than we have to encounter constantly in making our way up the harbor.

Int. 11. In giving the opinion you have expressed in your last preceding answer, do you locate the school ship as she is located on said chart, or how otherwise?

Ans. She should be a little farther to the eastward and northward, and I give my opinion with reference to her true location at her moorings.

Martin, the pilot of the Java, says, p. 130:—

Ans. It was not a rash act by any means; I certainly should never have attempted it if I had considered it a rash act; it was decidedly the safest track I could take to my dock; the outside track would not have been a proper one, because my track was obstructed by vessels at anchor, so I could not get to my dock. Under the same circumstances I should to-day take the same course, in preference to any by which it was possible to get to my dock. There was a good channel inside the school ship, certainly four hundred feet wide, giving us good room, plenty of good steering room, and it was the safest course I could take. The channel there was at least four hundred feet wide, with water enough for the "Java"; according to the chart, there is at least five hundred feet width of channel. If I had gone outside I should have had to go up towards Long wharf, leaving the vessels at anchor on my right, and then have turned to go to my dock, which I could not have done with a vessel of the length of the "Java" without the help of tugs.

If I had gone round or across them, at that time of tide, there was great danger of our sagging down on to them. I should not have considered it a seamanlike act to have gone round or across them, at that time of tide.

The testimony of the six other pilots, including John T. Gardiner, the harbor master, is given upon a hypothetical case in which it is believed no facts are included except such as are beyond dispute. We cite as a fair specimen of the six, the testimony in full of Abel T. Hayden, p. 138, 139: —

"*Int.* 11. [*De bene esse.*] Suppose that you were piloting a steamship like the "Java," drawing nineteen feet, up the harbor, bound for the Cunard dock at East Boston, with the wind from the west, a three or four knot breeze and at one hour's ebb of a spring tide, and that the school ship were not in the harbor and that there were no obstructions to your course, what would be your ordinary and proper course with reference to the moorings of the school ship?

Ans. The school ship would be about in the track in which I should go.

Int. 12. [*De bene esse.*] Suppose the wind and tide as stated in the eleventh interrogatory, and that the school ship were lying at her moorings, what would be your proper course in coming up the harbor to the same dock from the Upper Middle, and how would that course be determined?

Ans. I should head up for about the centre of the city, say about Commercial wharf, and then be governed by what vessels I should see; which channel I should take would be governed by what vessels there were in the stream. I mean by "which channel," whether I should go inside or outside of the school ship. I should endeavor to come close alongside of the school ship with the tide at one hour ebb, one side or the other of her.

Int. 13. Suppose with wind and tide as stated, that at the Upper Middle you had a clear view between the school ship and your dock, and that no vessels were there at anchor or sailing, and that you observed vessels at anchor to the westward of the school ship, what would be the proper course for you to take?

Ans. I should go inside of the school ship.

Int. 14. Where in your course should you determine, under the circumstances stated in the last interrogatory, whether to go inside or outside the school ship, and where and how should you change your course in order to go inside if you so determined?

Ans. Well, when I got probably half way from the Upper Middle buoy to the dock, about abreast of Slate Ledge buoy, I should determine which way to go. I wouldn't determine probably to go that way until I got to that point, so that I could determine how the vessels lay. As soon as I determined which way to go, if I was going inside I should port my helm, and steer right along by the school ship's stern, giving her a clever birth, perhaps fifty or a hundred feet from her, and as soon as I got by the school ship, should starboard my wheel and go straight for the dock, so as to lay her across the dock.

Int. 15. Suppose with wind and tide as stated in the eleventh interrogatory, you had observed at the Upper Middle a free course between the school ship and your dock, and that you had brought your ship up the channel to the point marked by the letter C, in the word "channel" on the chart now shown you and marked "Exhibit A, W. W. Jr.," and that you then observed several vessels at anchor to the westward of the school ship, in the way to your dock if you should go outside of her, would it in your opinion be an unusual or venturesome navigation for you to go inside the school ship, in the manner stated in your last answer, or how otherwise?

Ans. It would not be an unusual or venturesome navigation; I know of no reason why it wouldn't be perfectly proper. It is always a rule with us to go anywhere where we see a clear channel, if we have sufficient water.

Int. 16. Under the circumstances stated in the last preceding question, would you or not, consider it proper to go outside of the school ship?

Ans. I should go inside of the school ship by all means, under the circumstances there stated. [*Answer objected to, on part of Libellants.*] I should not consider it proper to go outside the school ship.

Int. 17. State whether the risk which you would incur by running close by the stern of the school ship in the same manner stated by you, of meeting an unseen boat or vessel coming out from behind the school ship, is an unusual risk, or how otherwise?

Ans. I should think the risk would be very slight; it is not an unusual risk; the risk of meeting a vessel coming out that the school ship would hide would be very slight. Any vessel under way, we would be likely to see her sails, and any vessel at anchor we would be likely to see before on the way up.

Int. 18. How common or uncommon is it for you in piloting steamers up the harbor, to pass by the sterns of ships at anchor in the channel, in the manner stated by you?

Ans. Very frequently; it is customary always, when we get in among the shipping at anchor to go very close to their sterns, sometimes we are not able to tell which side we will go of a vessel until we are within two or three vessels' lengths of her, the shipping is so close.

To almost precisely the same effect, see testimony of M. Reed, p. 145, 146. S. C. Martin, p. 151, 152. John T. Gardiner, p. 157. J. G. Lovell, p. 163. J. Low, p. 168.

That the vessels at anchor ahead of the school ship were so located as to obstruct her course outside to her dock, and that there were several, four, five or six such vessels, is shown.

Browne, 9, p. 81; 18, p. 82.
Moodie, cross 19, 21, p. 98, 99.
C. L. Gardiner, 23, p. 108. Coffin, 7, p. 102.
E. C. Gardiner, 12, p 115, says four or five:
Fengar, 8, p. 121, says some half a dozen:
E. G. Martin, 10, p. 127, says some five or six:
J. T. Gardiner, 26, 30, p. 159, says four, five, or six.

If the testimony of expert witnesses, with full knowledge of the locality and all the circumstances of the case, passing their judgment upon precisely such a question as it is their duty to solve in their daily avocation, is entitled to any weight whatever, the mass and weight of evidence here adduced proves that the course inside the school ship was at the time and under the circumstances a proper, prudent, and, so far as antecedent judgment could determine, a safe course for the Java to pursue.

(*d.*) *The Java pursued the course which she took, in a proper manner, and with all possible caution and skill.*

(1.) The hypothesis put to all the witnesses above cited, and upon which their opinions as to the rightfulness of her course are given, is, that she came in her course up mid channel to a point about off Slate Ledge buoy, and there took the necessary turn by porting her helm and heading just so as to clear the stern of the school ship at a distance of fifty to one hundred feet.

The proof that she in fact took this course is conclusive.

The best evidence, of course, must be that of the pilot, Captain Martin: —

"At the Upper Middle I could see that there was nothing in-

Ans. Well, when I got probably half way from the Upper Middle buoy to the dock, about abreast of Slate Ledge buoy, I should determine which way to go. I wouldn't determine probably to go that way until I got to that point, so that I could determine how the vessels lay. As soon as I determined which way to go, if I was going inside I should port my helm, and steer right along by the school ship's stern, giving her a clever birth, perhaps fifty or a hundred feet from her, and as soon as I got by the school ship, should starboard my wheel and go straight for the dock, so as to lay her across the dock.

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The proof that she in fact took this course is conclusive.

The best evidence, of course, must be that of the pilot, Captain Martin: —

"At the Upper Middle I could see that there was nothing in-

side the school ship to prevent my going to my dock. I could see that perfectly distinctly, or I should not have gone there. My course from passing up the Upper Middle was northwest-half-west; that's the usual course for that state of the tide. I found, when opposite Slate Ledge buoy, that it was my proper course to go inside the school ship, and I ordered the helm a-port to go under the school ship's stern. I observed a number of vessels lying at anchor to the westward of the school ship on the way to my dock, some five or six of them, so that it would have been dangerous to have gone between them; that was my reason for going inside the school ship, because it was a clear track inside and a foul one outside of the school ship. I ported my helm until I brought the ship to go on a line just clear of the stern of the school ship and then slowed her down intending to pass within a hundred feet or less of the school ship's stern; we slowed down to about four knots." E. G. Martin, 10, p. 127.

"We were heading about for the third or fourth wharf below our dock." Martin, 16, p. 129.

The testimony of Captain Browne, the first officer of the Java coincides with that of the pilot, but from his want of familiarity with the harbor, is, of course, of much less weight.

The rough sketch of the course of the Java, made under his direction, in presence of Captain Martin, "Exhibit A, W. W. Jr.," indicates the change at the letter "C," nearly opposite the Slate Ledge, and though erroneous in its location of the school ship, does not vary more in that respect than any shipmaster or pilot would be likely to do in attempting to transfer from the water, or from a properly constructed chart, to such a map as this, the locality of any fixed object.

The second sketch, "B," made by the witness, unaided, at the request of Mr. Dana (cross 23), is, in fact, more nearly correct, and in one of the two groups the location of the school ship is almost accurate.

Captain Moodie confirms the pilot, that the change of course

was made at Slate Ledge buoy, and that the course then steered was for a point just astern of the school ship.

Moodie, 7, p. 95. Cross, 6–14, p. 98.
See also Coffin, cross 6, p. 104.

Captain Charles L. Gardiner, who does not appear to have noticed the exact point or time when the steamer changed her course, says, that *at a quarter of a mile off*, "the school ship was about a point open on our port bow. I suppose we were steering about for the school ship's stern, so as to pass a hundred feet from her stern, and at that time our course was about three points from her heading." C. L. Gardiner, 12, p. 107.

Captain Fengar is clear and explicit: "She steamed up mid-channel until abreast of Slate Ledge buoy, then changed her course at Slate Ledge buoy more to the northward, to go to the eastward of the school ship." Fengar, 5, p. 120.

E. C. Gardiner says: "She came up the usual ship channel, and about opposite the Slate Ledge buoy I noticed that she headed to go inside the school ship, steering just about for her stern." E. C. Gardiner, 7, p. 114.

This testimony is confirmed by testimony from the libellants' own witnesses.

Horace Nickerson, who says he saw the Java before she altered her course, says that she then had the school ship about one point on her starboard bow. H. Nickerson, 10, p. 24. Cross 34, 35, p. 29.

The testimony of the Messrs. Nichols, in fact, determines beyond a doubt, that the change of course was made at the point where the pilot fixes it.

Mr. R. C. Nichols defines his position at the time of observing the steamship, as near the end of the fourth wharf below the steamship's dock; cross 21, p. 35.

From this position he saw the Java change her course when "about over a line drawn from where I was to the stern of the school ship"; 6, p. 32.

And that this was "about off Slate Ledge buoy"; cross 29, p. 36.

"After she changed her course she appeared to be heading directly for me"; 12, p. 33.

"Apparently to go astern of the school ship." "Almost bows on." Cross 11, 13, p. 34.

Before the change he "supposed she would go as near her (the school ship) as the channel would allow"; cross 33, p. 36.

Wm. P. Nichols fixes their point of observation at the same wharf designated by his brother, or the wharf above it.

"I think it was pier three; I won't be certain. I think we lay three piers below the pier that is roofed over"; cross 8, p. 37.

The steamer changed her course "about abreast of the 'Slate Ledge,' I suppose it is called."

The school ship did not at any time interrupt the view of the Java, nor did he see her at any time over or across the school ship; cross 11, 12, p. 40.

The steamer was about in mid-channel when first seen; and so continued till she changed her course opposite Slate Ledge buoy; cross 28, 29, p. 41.

After the change, the Java was coming at an angle of between thirty and forty degrees with the school ship; 18, p. 38.

Now, if, upon the chart of Mr. Boschke, a line be drawn from the point designated as their standpoint by these two witnesses of the libellant across the stern of the school ship, at a distance of fifty feet from her stern, it will be found to give, with as much precision as could possibly be expected from any two honest and independent statements of such a matter, the same point of change, the same course after the change, and the same variation in the course from the heading of the school ship, as Mr. Martin has given. It is a statement which we are willing to adopt as the respondents' theory of their case upon this point.

The course of the Java, then, as stated by the pilot, may be considered as established; and it is this course which has met the approval, as we claim, of every competent witness called to testify upon the question, including Capt. Matthews, of the school ship.

It is indeed contended by the libellants that the steamer in coming up the harbor, in case she intended to go inside the school ship, should have kept on the northerly side of the channel so as to keep the inside passage open to view.

The reply to this contention is suggested and deemed conclusive both by the District and the Circuit Court; the steamer did not and could not determine so far below the school ship on which side of her she should pass; that was to be determined by observation from a nearer point; and if she had kept on the northerly side up to a point opposite Slate Ledge buoy, and then had been obliged to go outside the school ship, she would have incurred the same risk of meeting an unobserved and unexpected schooner there, as she did in crossing in the other direction to go inside. The risk was equal: and the proof is that she kept the usual course up mid channel; and that such was the proper course, on whichsoever side of the school ship she might eventually decide to pass.

(2.) *The case shows that all due precaution was taken in the equipment, management and speed of the steamer, as she pursued the course thus designated.*

(*a.*) In regard to the vigilance of her lookout, the testimony has been already fully considered.

The testimony of Mr. Martin already cited shows that he diligently observed all the way up from the Lower Middle with his glasses; *and that at the Upper Middle, only one mile below the place of collision, he carefully scanned the whole passage between the school ship and East Boston of which he there had a clear view, and found it clear of vessels at anchor or under way.*

E. G. Martin, 10, p. 127.

In the Circuit Court this fact or its important bearing as determining the Java's course, appears to have been overlooked; and to this is attributed the one error in fact, of which we complain in the decision of that court.

We refer to it at present only to show vigilance on his part in selecting and pursuing his course up the harbor.

See *infra*, pp. 52 and 53.

(*b.*) That the steamer had all the appliances which modern nautical science supplies for instantly communicating orders from the bridge to the wheel and the engines, is fully proved.

The arrangements for giving orders from the bridge to the wheel by telegraph are stated by Herriot, 7, p. 87, and the similar mode of communication with the engines by Slading, 13, p. 90.

And it also appears that, not relying solely on these methods, full and complete arrangements are made for communicating orders by voice and hand signal; that there were, at entering port, four quartermasters at the wheel; that the engineer was at his post ready for instant action, and that the engines were peculiarly adapted for stopping or backing instantaneously.

Herriot, 3, p. 87; 14, 15, p. 88. Slading, 4, p. 89. Moodie, 5, 17, p. 94, 95. Martin, 8, p. 127.

(*c.*) To this adequate preparation for any emergency which might be expected in entering port, we submit the case shows that a corresponding degree of careful, responsible, and intelligent action in the management of the ship was superadded.

The speed of the ship had been reduced at the Lower Middle to half speed; and at Slate Ledge buoy she went at "slow," which would give a speed of four knots.

Martin, 10, p. 127. Moodie, 9, p. 95. Brown, 27, p. 82. Herriot, 19, p. 88. Slading, 9, p. 89. Coffin, 8, p. 102. Gardiner, 5, p. 106.

To this testimony of the persons on board the steamer, we add the statement of Captain Fengar and Captain E. C. Gardiner, that the steamer was moving at a slow rate of speed.

Fengar, 5, p. 120. Gardiner, 7, p. 115.

It is further proved, by almost the same amount of testimony, that at a distance from the school ship's stern, variously estimated by the different witnesses at from three to five lengths of the steamer, the engines were stopped for the purpose of reducing the speed of the Java in order to allow a schooner under canvas, the sails of which came in sight over the school ship, to pass down by the steamer, as she did at a safe distance to the northward.

The facts as to this schooner under canvas are clearly testified to by Browne, Moodie, Martin, and Coffin.

The libellants' counsel may refer to Slading's testimony, as differing from theirs as to the distance from the school ship at which the engines were stopped. But it is plain that from his position at the wheel, he had no opportunity of observing or judging of distance. Moodie, 39, 40, p. 97.

The action of the steamer in stopping, and the apparent cause for it, were also observed by Captain C. L. Gardiner, Captain E. C. Gardiner, and Captain Fengar. That her engines did not again move ahead before the collision is established by the same testimony.

By thus stopping her engines and continuing with them stopped, the speed of the Java was reduced, so that on coming up within her length of the school ship's stern she was moving over the ground probably not over two knots per hour, or through the water against a tide of one or one and a half knots, not over three knots per hour.

The Court is too familiar with the difference in estimating speed which always is found to exist between witnesses having a different interest or bias, and which almost as uniformly exists

between witnesses entirely unprejudiced and disinterested, to expect to find a fact of this nature distinctly and accurately proved in a cause of collision.

Captain Moodie states the speed of the ship at the moment of discovering the McCloskey at about one and a half knots per hour; doubtless meaning over the bottom: Mr. Browne states it at two knots, doubtless with the same meaning; either statement is more likely to be an under-statement than an over-statement of the fact, though both were doubtless honestly made.

The testimony of the experts, given in cross-examination of the libellants' counsel, would indicate that a ship like the Java, running at four knots per hour against an ebb tide of one hour, at the school ship's location, would, if her engines were stopped at a distance of four lengths, be running three knots at one length from the school ship's stern.

Hayden, cross 18, p. 142. S. C. Martin, cross 43, p. 155. Lovell, cross 18, p. 166. Low, cross 6, p. 266, 170.

Upon the whole testimony, it cannot be maintained that, at the time she reached the point where she discovered the McCloskey, and the imminent danger of collision became apparent, the Java was running much under or much over three knots per hour through the water, or two knots over the bottom.

That this is a sufficiently slow and cautious rate of speed at which to pass the stern of the school ship and enter the passage to her dock, is beyond question. Capt. Matthews, the only witness of the libellant who expresses an opinion upon the subject, fixes "three knots through the water on an ebb tide" as not venturesome or hazardous, even where there is a liability to meet a sailing vessel in a narrow passage. Matthews, cross 6, 9, p. 11.

The angle at which the steamer crossed the stern of the school ship was an acute angle not exceeding three points from the heading of the school ship.

This is apparent from the fixed facts as to the heading and the position of the school ship as shown by the chart, the place where the steamer changed her course, and her heading after the change.

It has been already demonstrated by reference to the testimony of the Messrs. Nichols and its application to the chart.

It is confirmed by the weight of direct testimony.

Captain Nichols states the angle between the Java's course and the heading of the school ship at between 30 and 40 degrees (18, p. 38). Captain C. L. Gardiner (10, p. 107) states it at three points, — that is, thirty-three and three quarters degrees; Captain E. C. Gardiner (7, p. 114) puts it at two points; Captain Fengar (13, p. 122), at thirty to thirty-five degrees; Captain Martin says (16, p. 129), "If we had headed two points more to port we should have been on the same line as the school ship, — *we were heading about for the third or fourth wharf below our dock.*"

The direct testimony of Mr. R. C. Nichols (11, p. 32), that in his opinion the angle of the two ships was about forty-five degrees, is refuted by his own statements as to the heading of the steamer, as well as contradicted by his companion: evidently the error arises from his assuming a different heading for the school ship, of two points more to the west than shown on Boschke's plan (see cross 22, p. 35). But if that change of heading is given to the school ship, it would bring her stern farther to the northward, and would bring the course of the Java still more directly up the harbor than we claim it to have been.

The statement of Captain Elnathan Crowell, that the steamer "was heading right square in across the school ship's stern, and if she had gone the length of her after she struck us, on the same course, she would have been hard aground" (31, p. 50), is simply absurd, and damaging only to his own credibility.

His son, the mate of the McCloskey, is more modest. Probably his former experience in giving the position of the two

vessels, when he testified. *that the school ship's head was down stream and the schooner was going down stream* (cross 38, p. 61), did not encourage him to re-state the angle; he now contents himself with answering, "I can't tell." (41, p. 61.)

This, too, is strongly confirmed by the uncontested proof as to the angle at which the two vessels came in collision.

It is conceded on all hands, that the schooner headed a little more to the northward than the school ship tailed; that is, she headed a little off from the line of the school ship; and this difference is generally stated at about one or two points. It is in controversy, whether the schooner paid off farther to port, that is. to the northward, just before the collision; the claim on her part is that she did so, about two points more.

It is not claimed that the steamer changed her heading perceptibly, or more than half a point or a point to port after she discovered the schooner.

Now, if we allow three points for the difference between the line of the steamer and school ship, two points more for the angle the schooner made with the school ship at the moment of collision, and nothing for the change in either vessel's course, we have five points as the angle at which the two vessels came together. And if we allow that each vessel paid off to port one point or half a point between the moment of discovery and the moment of collision, the result is, of course, the same.

And, upon the whole testimony, the blow was rather a glancing blow than otherwise, and at less rather than more than five points, the mate of the schooner not making it more than thirty-five degrees; see 23, p. 56, Exhibit V; the master making it about fifty degrees, and attributing the glancing character of the blow to the fact that he starboarded his helm so that his schooner fell off two points; whereas it is evident that the effect of such a movement would be to make the blow less glancing and more nearly square.

The direct testimony and the inference from undisputed facts then concur in showing that the course of the Java could not have been more than three points from the line of the school ship's heading; and there is nowhere any claim made, or any foundation laid for the claim, that if a vessel's stern is to be crossed by a steamer, this is an unsafe or venturesome angle at which to cross it.

Crossing the stern of school ship at an acute angle not a fault.

And this brings us to the consideration of the precise question upon which, in the opinion of Judge Lowell in the District Court, and of Judge Shepley in the Circuit Court, this cause turns.

Judge Lowell says: "The case is simply one of running under the stern of a vessel at anchor, at a somewhat acute angle; and I am not prepared to say that this is bad navigation, if it be done as slowly and with as much vigilance as is shown in this case."

And again: "So that it comes back, as I have said, merely to the question of running under the stern of a vessel at anchor at an acute angle. And I cannot say that any negligence has been shown on the part of the officers of the steamer, but must hold that this accident, though occurring in broad day, was what the law terms an inevitable misfortune."

Judge Shepley says: "But as well stated by the learned Judge of the District Court, in his opinion in this case, 'whatever direction she had taken, the school ship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another.'

"The collision might and would have happened as it did, had the school ship been anchored in any other place, provided the relative positions of the three vessels in reference to each other had been the same."

"It therefore seems properly to resolve itself into a considera-

tion of the duties and liabilities of a steamship running under the stern of a vessel at anchor at an acute angle, considered in reference to the possibilities and probabilities of a small sailing vessel passing at the same time behind the vessel at anchor, which was so large and high out of water as to intercept the view of a small schooner, tug boat, or flat boat in a channel or passage much frequented by small vessels."

The two Courts then passing upon the same problem of law and of fact have come to these different conclusions: The Judge of the District Court decides that crossing the stern of a ship at anchor, with the degree of precaution and skill shown by the Java, is no fault and therefore subjects her to no liability; the Circuit Court decides that any degree of care or vigilance was insufficient if the steamer is "powerless to prevent a collision with a sailing vessel after it was seen, *which she had a right to expect to meet in the position in which it was first seen*"; that such want of power is in itself a "want of seasonable precaution and therefore a fault."

One difference between the two Courts clearly is this: The District Court recognizes the fact that the necessities of commerce frequently, — constantly require steamers entering or leaving port to cross at an angle more or less acute the sterns of ships lying at anchor in the channel way.

We submit with all deference that this necessity was not sufficiently recognized in the Circuit Court.

In the nature of things the channel, where loaded ships will not take the ground, is their temporary anchorage; the passages to the wharves and docks of all large ports are occupied by inward or outward bound ships detained by the contingencies of commerce and navigation. At the ebb tide, and with more or less conformity to the direction of the tide, according to the force or direction of the wind, these vessels head up the harbor, and unless a steamer entering port can run exactly on a line with all of them to her dock, which is a manifest impossi-

bility, she must cross the sterns of some of them at an angle more or less acute.

We have introduced the testimony of a body of competent witnesses, though such proof seems hardly to be required, to show that this is a matter of every day's occurrence and of necessity. E. G. Martin, p. 131: —

Int. 32. State whether the danger of collision with an unseen vessel incurred by running past the stern of a ship lying at anchor, as you ran by the school ship, is an ordinary or extraordinary one, and how common or uncommon such risk is in piloting a ship into Boston harbor.

Ans. We have to take those risks with almost every ship we come up with, going by ship's sterns or their jib-booms; we are obliged sometimes to go within ten feet of the stern, just go by, but we generally don't like to go within fifty feet. There is the same danger in passing any ship, that there was in passing the school ship, namely, the danger of a vessel's coming out from behind her. It is common for vessels to anchor in the channel, so that we have to go very near them, and avoid them as we can.

Hayden, p. 139, says: "I should think the risk would be very slight; it is not an unusual risk; the risk that of meeting a vessel coming out that the school ship would hide would be very slight. Any vessel under way we would be likely to see her sails, and any vessel at anchor we would be likely to see before on the way up."

Int. 18. How common or uncommon is it for you in piloting steamers up the harbor to pass by the sterns of ships at anchor in the channel in the manner stated by you?

Ans. Very frequently; it is customary always when we get in among the shipping at anchor to go very close to their sterns; sometimes we are not able to tell which side we will go of a vessel until we are within two of three vessels' lengths of her, the shipping is so close.

S. C. Martin, p. 15, says: —

Int. 17. State whether the risk which you would incur by running close by the stern of the school ship, in the manner stated by you, of meeting an unseen boat or vessel coming out from behind the school ship, is an unusual risk or how otherwise?

Ans. There is nothing unusual there, you are liable to meet the vessels in that way in any part of the harbor.

Int. 18. How common or uncommon is it for you, in piloting steamers up the harbor, to pass by the sterns of ships at anchor in the channel in the manner stated by you?

Ans. We often pass as close to the sterns of ships, probably six times in eight coming up the harbor.

J. G. Lovell, p. 164, says:—

Ans. It is an every day occurrence.

John T Gardiner, pilot and harbor master, whose business it is to establish and enforce the rules as to anchorage, says, p. 158, in answer to the same interrogatories:—

Ans. 17. Not at all an unusual risk, you can always see vessels at anchor by their masts, or if under way by their canvas; if there were small vessels at anchor behind the school ship you would expect to find plenty of room to go inside of the school ship, and go clear of them one side or the other of them. This is the case with the ebb tide because you can have a chance to sheer your vessel one way or the other without danger, if the vessels are at anchor.

Ans. 18. It's frequently the case that we have to go by vessels in that way; it's a very usual occurrence because there being so many vessels at anchor we have to govern ourselves by where we see the clearest course.

John Low, p. 168, says:—

Ans. 17. It is an uncommon thing to have happen, to have one come out by the school ship, and not see it. I should not consider it an unusual risk to run, in that way, by the stern of the ship.

Ans. 18. We do it most every time we come up, either by the head or the stern.

We do not of course claim that the testimony of the ordinary course of the pilots of Boston harbor controls the rule of law applicable to the case by establishing a custom; but we submit that a course of navigation which is so obviously a necessity by natural laws, which has been, and is, and must continue to be practised, unless the commerce of the port and of the other great ports of the world is to cease, is not one which is, *per se*, to be condemned as a fault; nor can it be the rule of law that any rate of speed is fault, and any degree of vigilance is inadequate which fails to secure absolutely the safety of other ves-

sels in such a course of navigation. On the contrary, we contend that on all authority the proved necessity of such a course and its constant practice, confirming the uncontradicted testimony of a large number of competent experts as to its safety and propriety, show that under the true rule of law such a mode of navigation, though subject to some risk, is a lawful and proper mode if conducted with the proper degree of caution and the highest exercise of skill; and that the degree or sufficiency of caution and skill are not necessarily determined by the result.

Within the authority of *The Grace Girdler*, 7 *Wall.* 196, we may surely sustain the proposition that this course of navigation in itself, and our degree of caution in pursuing it, are proved to be "such as is usual in similar cases and has been found by long experience to be sufficient to answer the end in view, the safety of property and life."

To hold, as we understand the Circuit Court to hold, that the steamer is justified in taking the course she took, but that she takes it at her peril and is accountable for any collision which may ensue, without regard to the rate of speed, vigilance or precaution and skill with which she takes it, is to impose a liability without fault, or to impute fault where it cannot be pointed out.

Error of Circuit Court on question of fact.

And precisely at this point, we believe that an error of fact, or the disregard of a proved fact, contributed to what we claim to be the error in law on the part of the Circuit Judge.

It is assumed against the Java that she had reasonable cause to expect to meet a sailing vessel just as she met the McCloskey as she crossed the stern of the school ship; and on this ground fault is imputed to her.

With all deference we submit that such assumption is without foundation, and is against the whole weight of evidence in the cause.

A most important proved fact in the case is, that at the Upper Middle, only one mile below the point of collision the Java had a clear view of and through the whole passage inside the school ship and up to her dock, and knew it to be free of vessels at anchor or under way.

This view, allowing the steamer an average rate of six miles per hour, was only ten minutes before the collision.

This fact, controlling, as we contend, upon the question of due caution, is nowhere adverted to in the opinion of the learned judge of the Circuit Court, and may well be deemed to have escaped his notice.

Its bearing upon the question of the prudence of the course pursued by the Java, is obvious.

The single point of danger was at the school ship; the remainder of her course was open and unobstructed. The school ship was a permanent, fixed object, narrowing the channel at this single point, which being once passed, the entire course was free.

Now with the moderate three or four knot breeze prevailing at the time, no vessel under sail, from a point above the pilot's range of view at the Upper Middle, could in the space of ten minutes have reached this point of danger.

Much less could barges, scows, or flat boats without sail have done so; even if such things were frequent on the outer harbor, as they are not.

Moreover a vessel under sail coming into the passage would have been readily discovered, and easily avoided, as was the case with the single schooner under canvas which actually came in.

The only possible contingency, then, from which danger could accrue would seem to be that which actually occurred, viz., a vessel from East Boston, not under sail, and with speed derived from a tug which had towed her out and left her unmanageable in the way.

But more than all this, a careful consideration of the problem, or a reference to the chart, will show with the accuracy of a mathematical demonstration, that it was only by giving to the schooner a course within the very narrowest lines and from a very narrow section of the East Boston wharves, that even by the help of a steam tug, and as if by a preconcerted design, she could have remained concealed from the steamship during the whole course of the latter up the harbor from the Upper Middle.

It will be found difficult to construct upon the chart a scheme or diagram which shall satisfy the conditions of the problem which these two vessels contrived to solve in so disastrous a manner. The difficulty shows the improbability that it should be so solved; and entitles us to rank the occurrence of the collision among the improbabilities so near to impossibilities as to be beyond the reach of caution, skill or responsibility, and to include it, therefore, under the category of unavoidable accident.

We claim, then, to have maintained the proposition, that up to the moment of the discovery of the schooner there had been no negligence, want of precaution, or act or omission of the Java, in taking the course she took, or in her manner of taking it, which can be imputed to her as fault, or affect her with liability.

C.

We further contend that the steamer used all proper measures and due diligence and skill to avert the collision, after discovering the schooner and the imminence of the danger.

That all which was possible was done on board the Java to avoid the collision; and that nothing was done by her which should not have been done.

Upon this point there appears no disagreement between the opinions in the Circuit and the District Court; but the brief of the libellants may require a discussion of the testimony.

(*a.*) *Immediately on discovering the schooner, the Java's engines, which had previously been stopped, were reversed at full speed, and her helm was put hard to starboard.*

The promptness with which the orders given to this effect on board the Java were given and executed, is fully proved.

Mr. Browne states his *belief* that the order to reverse the engines was given before or at the time he discovered the schooner from the forecastle; he is equally careful in his statement as to the order to starboard; doubtless because he heard neither order; but he knows, and states his reason for knowing, that the engines were reversed, viz.: "by the speed with which we went astern immediately we touched her; or after the collision." Cross 40, p. 86.

Captain Moodie's statement is clear and explicit. He says, at discovering the Java, "the engines were reversed full speed and our helm put hard-a-starboard." "By the pilot's orders; they were communicated by myself to the officers abaft me; the orders to the engine room by telegraph; to the helm by hand signal, and by passing the word, and I gave it by telegraph also."

"The engines were reversed in two or three seconds and the helm put to starboard immediately." "The engines were going back full speed in fourteen or fifteen seconds after the orders were given and before the blow." Moodie. 16, 17, 18, 21, p. 95, 96.

He also states his opinion, now entertained, that nothing "could have been done on board the Java, after discovering the McCloskey, which was not actually done"; and that "nothing was done which should not have been done." Moodie, 36, 37, p. 97.

Coffin states that "the order was given to turn the engines back full speed, and helm put hard-a-starboard." "They were given immediately on seeing her; they were executed as quickly

as the engines could be reversed, — say ten seconds." At the time of the collision "they had made a number of revolutions back; they had been turning back half a minute." Coffin, 16, 17, 18, p. 103.

Captain C. L. Gardiner says: "Our engines were reversed instantly, probably within fifteen seconds."

Captain Martin says: "After seeing the schooner's jib-boom and bows, I gave the order to turn back full speed and helm hard a-starboard; that was done in order, if possible, to avoid the collision, and if it must come, to ease it as much as possible. I gave the order as soon as I could make out what the moving object was; it might have been a minute from the time I saw the first motion, — not over a minute, sure. The order was given by myself first to starboard and go back full speed, which Captain Moodie gave by telegraph and by voice also. Captain Moodie gave the orders instantly after me; the orders were executed instantly; as quick as it was possible to do, the engine being at a dead stop at the time." Martin, 10, p. 128.

On cross-examination the pilot states more exactly the time of giving the orders with reference to the time when he first discovered the movement of the schooner's foresail over the school ship's quarter, and makes it plain that the word "minute" used by him had in this case the signification which it ordinarily has with seamen, of moment, or *punctum temporis*, rather than sixty seconds.

He there states that he deemed it necessary to give an order when he "first saw that the object seen across the school ship was a schooner going down."

"The first thing that attracted my attention that she was a vessel moving down, was a piece of sail, a piece of her foresail, which was then being hoisted, the throat of the sail about one third up, the peak of the sail hanging down. *I then gave my orders.*" "Her hull was not out. I saw her foresail and her jib-boom all at one glance." "No," I did not see her bow out

clear of the stern when I gave the order" (cross 21–24, p. 133, 134).

That the orders to back and starboard were both given and heard before or about the time the schooner's bow came out under the school ship's stern; "while her foresail was over the ship's quarter" (cross 29, p. 134).

This statement entirely agrees with Captain Martin's estimate of the distance of the McCloskey at the time he discovered her, given in the direct examination (12, p. 128).

"She was very nearly abreast the starboard bow of the school ship; she might have been two lengths of my ship from my bow; my bow had not come up with the school ship's stern when I saw the schooner"; while on cross-examination he says that when the schooner's *bow* first come out it might have been a length of the steamer off from the steamer's bow (cross 28, p. 134).

The instant execution of the orders when given is proved by the persons executing them.

Herriot, the engineer, says the order to turn back full speed was executed instantly, in from three to four seconds, under the most favorable circumstances (9–15, p. 87).

Slading, who was at the helm, says the order as to the helm was executed instantly, in from six to eight seconds (14, 15, p. 90).

(*b.*) *The propriety of the order to reverse at full speed is obvious, and the complaint of the libel is that it was not done sooner.*

(*c.*) *The propriety of the order to starboard the helm has not been and probably will not be questioned.*

If it be so, we submit that the proved position of the vessels at the time they discovered each other, and the concurrent testimony of all the parties looking on, and of all examined as experts, fully demonstrate that the proper course for both vessels was to put the helm hard to starboard at the moment of discovery.

Upon the whole evidence in the case, the schooner, at the moment she was discovered, was on the starboard bow of the school ship, at a distance of about one hundred feet laterally from her.

Moodie, 14, p. 95, 35, p. 97. Coffin, 14, p. 102. Martin, 12, p. 128. Fengar, cross 32, p. 126.

And this is the only intelligent or intelligible statement as to the position of the schooner at time of the discovery.

It is in vain to look to the testimony from on board of the schooner for any information on this point.

Capt. Elnathan Crowell, who says that the steamer at no time was nearer than *five hundred yards* to the stern of the school ship, and whom a diligent cross-examination by his own counsel failed to induce to correct or qualify this statement (see 42, 43, 44, 45; p. 51), can hardly be expected to measure distance or judge of angles with any great accuracy; and his son, Peleg, in answer to the inquiry, "Had you, or not, got abreast the school ship before you saw the Java" replies simply, "I didn't notice whether we had or not." P. T. Crowell, 20, p. 56.

These are the only witnesses called by the libellants from their own vessel.

The position of the schooner, then, as assigned by the witnesses from the Java, is unquestioned.

Her heading at the time she was discovered was a little off from a line parallel with the school ship, to the northward and eastward; and of course the Java had the right to presume, as was the fact, that her line of motion was in that direction.

Pennington, 13, p. 20. Nichols, cross 3, p. 39.
E. Crowell, cross 16, p. 52. C. L. Gardiner, 13, 107.
E. C. Gardiner, 8, 115. Fengar, 6, 121.

With the schooner thus situated, the only chance for avoiding the collision, evidently, was for the steamer to reverse, and to

starboard her helm, with a view to get as far to port as possible, and to pass between the schooner and the school ship.

That the steamer so nearly succeeded in this attempt as to strike only a glancing blow abaft the main rigging of the schooner instead of cutting her in two amidships, so that a very slight change of a point or two more in the steamer's heading, or a gain of twenty or thirty feet to the eastward by the schooner, would have saved the collision, certainly justifies the manœuvre.

The testimony of every expert examined supports the pilot in this order; and the schooner's own course in starboarding the helm ratifies it.

It is too plain for argument, that to have ported the helm would have rendered the case hopeless, and would have increased the damage sustained.

The Java was not in fault for not anchoring after she discovered the schooner.

(*d.*) The counsel for the libellants may contend as in the Circuit Court that the steamer should have anchored at the time of discovering the schooner.

To this it may be a sufficient reply, in law, to say, that negligence in this regard is not charged in the libel.

The allegation is that the "*steamship caused this collision by not seasonably altering her course, and by not seasonably stopping and backing her machinery, and by her unusual and venturous navigation, or by one or more of said faults*"

It is submitted that neglect to anchor when the collision was imminent is not charged under any head of this allegation, and that testimony to support such charge is inadmissible.

It may further well be claimed as a reply upon this point, that the fact that it was not suggested during a ten days' trial and argument in the District Court, by counsel so eminently skilled in nautical matters as the learned advocate of the libellants is known to be, goes far to show that it is unsound.

And this view may well be held confirmed when the Court shall find, as it will find that of all the witnesses examined, and of *all who might have been called and examine l*, not one who ever commanded, or even, so far as appears ever sailed in, a steam propeller, gives his opinion that the Java, upon the facts as seen, or upon any hypothesis of facts stated, could have anchored, or ought to have anchored, in order to avoid this collision.

The testimony on the part of the libellants upon this point has been taken subject to our objection, on which we still rely.

The cross-examination on the part of the claimants has been "*de bene esse*"; and, subject to the objection taken, we have also examined to this point every competent expert whom we have introduced, either to the facts, or the theory of this case.

To maintain the libellants' charge if it be admissible they must clearly prove: 1st, That the Java could have anchored; 2d, That by so doing she would in all probability have avoided the collision; 3d, That it was an act which would have occurred to an officer of competent skill and prudence. The City of Antwerp, L. Rep. 2 P.C. 25–35.

Reviewing, then, the libellants' testimony, we find:—

Captain Matthews states that, upon the case stated, "there would be no nautical objection to his at once letting go an anchor"; and that he "should do so certainly." He had not commanded or served on board a steamer. Cross 10, p. 11.

Blaney, Jenkins, and Pennington are not inquired of upon this point, being deemed, as they clearly are, incompetent.

Horace Nickerson says there was nothing to prevent her anchoring astern of the school ship. 28, p. 26. The question proposed to him was entirely indefinite; and of course the Java might have anchored astern of the school ship, if she took time enough and distance enough.

But Capt. Nickerson never commanded or sailed in anything but a schooner. 2, p. 23.

Richard C. Nichols admits his incompetency to form a judgment upon the question. 20, p. 33.

Wm. P. Nichols evidently distrusts his own judgment in the case; and though he was *led* by an objectionable question to say that he could see no objection to her anchoring at the time, he says in answer to the only proper question propounded on this point, which would have been admissible if he were proved competent, and if he had not been already led, that the collision "might have been mitigated, I think, by reversing her engines; that is the only thing that I know of. *I ain't enough acquainted with steamers to form any other opinion than that.*"

Capt. M. B. Tower is the only other witness examined by the libellants upon this point.

He states that, upon the case supposed, he should reverse the engines and let go the anchor; and that, in his opinion, it would stop the steamer. 17, 18, p. 65.

Upon cross-examination it is apparent that in expressing this opinion, he relies upon being able to get stern-way on his steamer before she could sheer into the school ship, and upon backing her straight out in the track on which she had been going; and that he would expect to drag his anchor fifty feet, and to allow but twelve or fifteen fathoms of chain.

The competency of this witness to testify as an expert is not shown.

He is wreck-master and underwriters' agent; and his business, as is well-known, requires him to use a tug-boat about the bay. But that he knows anything of the management or navigation of a ship of this class; or has any means or need of knowing the strain which a steamship of 2,700 tons would bring to bear upon her cable, if anchored under headway with twelve fathoms of cable, or her liability to sheer out of her course if checked with a longer chain, there is not the slightest proof.

To compare the competency, skill, or judgment of Captain

Matthews, who for eight years has lain at his moorings seven months per annum, and during the remainder of the year has sailed his ship in his old-fashioned way with his school-boys on pleasure trips about the bay; or of Captain Tower, whose steam-tug, designed and built for sharp turns and short stops can be brought to anchor as easily as a fisherman's dory, with that of such men as Captain Moodie, with his fourteen years of service (now sixteen) as master in the Cunard ships, or Browne with his eight years of service in the like employ, with their familiar knowledge of their own ship; or to compare any one or both of these witnesses of the libellants with the pilot who was in charge of the Java at the time of the collision, with his experience of thirty-three years; or with any of his six fellow-craftsmen, whom we have produced to testify upon this question; or with Capt. C. L. Gardiner, an experienced, active shipmaster of the modern school, commanding a propeller, or with Capt. Fengar, with his experience as sailing master of the largest class of frigates, the Cumberland and Minnesota, — would only be less absurd than to place Capt. Moodie, who is at the head of his profession, and his first officer, who is on the way to the like position, with the stupid master and more stupid mate of the McCloskey.

The insuperable objections to anchoring the Java at the time of the discovery of the schooner are stated with sufficient clearness and force by all the witnesses of the collision who were competent to form an opinion upon the facts observed.

They are substantially these: that in attempting to bring up so heavy a steamer as the Java, with the immense momentum which her size gives to her even at the lowest rate of speed, with a short chain, would part the chain or do damage to the steamer, and render her unmanageable; that to give her more scope of chain would inevitably sheer her into the school ship; that if she dragged her anchor by reason of its not holding at first, she might carry it into water shoal enough for it to injure

her bottom as she ran over it; and that by anchoring the steamer would lose that control of her motion on which a steamship rightly depends for her safety and the safety of others, in such an emergency, and which she should surrender only in a case of *certain* success by doing so.

Martin, 34, 36, p. 131, cross 50, p. 136; re-ex. 41–44, p. 136.
C. L. Gardiner, 26, 27, p. 111. Cross 33, 36, p. 112.
Fengar, cross 26, p. 125.

Neither Captain Moodie nor Captain Browne were examined by the respondents upon this point, in their original depositions, because, at the time of their examination, the question had not been raised by the libellants in their pleadings or their testimony.

But we have had the opportunity of recalling Captain Moodie and Captain Browne, and we confidently refer the Court to their second depositions as the statements of skilled and experienced witnesses upon a question of nautical skill and judgment, who have all the materials for forming an opinion within their own actual knowledge.

2 Browne 21, 24, p. 172. 2 Moodie, 24, p. 175; cross 19, 30, p. 177.

To this testimony of the witnesses to the facts of the collision, we have added the opinions of six pilots, — Hayden, S. C. Martin, Reed, J. T. Gardiner, Lovell, and Low, — called as experts, to testify upon a hypothetical case containing the elements of the actual one, to the question of the practicability or expediency of anchoring a ship like the Java, under the circumstances proved.

No objection can be made to the competency of these witnesses; it is evident that no other class of men can be found so

competent as they, who are familiar not only with the navigation and management of steamships of all classes, but with the location of the school ship, the tide, the harbor and all the surroundings of the case.

The case put, so far as it is hypothetical, is believed to be beyond objection. The interrogatory in which it is to be found is the nineteenth direct interrogatory, except in the case of Reed, where it is the eighteenth.

Upon this supposed case, we have the unequivocal opinion of these six experts that to anchor the Java under these circumstances would have been unsafe, impracticable, improper.

Hayden, 21, 25, p. 140; cross 27, p. 142.
Reed, 20, p. 146. S. C. Martin, 22, p. 152; cross 8–17, p. 153.
John T. Gardiner, 20, 21, p. 158; cross 9–13, p. 160.
Lovell, 21, 22, p. 164; cross 8, p. 165; Low, 21, p. 169.

Such is the testimony of all the skilled and competent witnesses upon the question of anchoring. And how is it met? The libellants' counsel, familiar with the subject in controversy having at his command all the sources of information from which the Court could desire instruction upon a question of nautical skill; knowing the thirty or forty pilots of the port, and knowing that with their rivalry, sharp competition, and jealousy of each other, there is no class feeling which would deter them from testifying against the opinions of those whom we have called; knowing, moreover, the commanders of steamships of other and rival lines, here and in all parts of the world, and with the unlimited means of most wealthy clients at his command, has brought not a single witness, of competent experience and skill, to express an opinion which could aid the judgment of the Court. What is a still more striking fact, having upon the stand one such witness, a pilot, he has forborne to ask him a single question, not only upon this point, but upon

all the other points involved in the case, in which he has freely sought the judgement of Horace Nickerson, Judah Baker, and even Elnathan Crowell.

This brings us to the consideration of the original and novel method in which the attempt is made to overcome the mass of testimony which we have offered as to the safety and practicability of anchoring the Java at the time of the collision.

It is proposed to answer it by the testimony of Jacob K. Lunt, a pilot, and Frank Bird, a boatman, to the effect that on another occasion in the harbor of Boston, the Java was brought to and a collision avoided by letting go an anchor, when she was moving at the rate of three knots per hour.

The fact, if admissible in proof and proved, would not go far to answer our case; it would merely go to show that that was *possible* which our witnesses pronounce unsafe, impracticable, and improper; and it wholly fails in any resemblance to the case of the McCloskey with the attendant peril of collision with the school ship to be avoided.

But, in the first place, the testimony offered was duly objected to, and is wholly inadmissible; and secondly, we have shown, if we are held bound to show it, that the occurrence narrated never took place.

(1.) The testimony is inadmissible because it is upon a collateral issue, which the respondents are not bound to meet; and to allow its introduction would result in testing one point in dispute by another.

The cause to be tried is that of the collision of the Java and the McCloskey. To allow this testimony involves the trial of a cause of collision which might have occurred between the Java and the Ambrotype.

Collins *vs.* Dorchester, 6 Cush. 396.
Emerson *vs.* Lowell, 3 Allen, 410, 417.
Lincoln *vs.* Taunton Copper Co., 9 Allen, 181.

The respondents have not offered evidence of like cases in which anchoring has resulted in loss and damage, because they are restricted by well settled rules of law from so doing. The experts called by us would not have been allowed to detail the cases on which they found their testimony upon questions of skill. Ingledew *vs.* Northern R. R., 7 Gray, 86.

No better illustration of the necessity of enforcing the rule of law excluding testimony upon a collateral issue could be afforded than this very cause now presents.

If this testimony as to the case of the Ambrotype is to be admitted, we must of course be allowed to rebut it; and accordingly, taking our testimony *de bene esse*, we proceed so to do, and to present the other side of that new issue, in case the Court shall see fit to enter upon it.

(*b.*) We claim to show that the pretended case of a collision avoided by anchoring the Java while running at the rate of three knots per hour is a pure fiction, and that no such occurrence ever took place.

The story narrated by Mr. Lunt, and for the first time brought to light in March, 1870, is that on the night of July 2, 1866, coming up the harbor in the Java, *when he had got up as far as East Boston Ferry*, having stopped the engine, but going at three knots per hour with a flood tide, he discovered a small vessel ahead, and not being under steerage way he dropped anchor, brought up the Java in half her length, and got clear.

The date, given in answer to cross-interrogatory 6, as July 2, 1866, will be admitted to be a mistake for July 2, 1867, as the Java made her first trip to Boston in November, 1866.

The error is of no consequence whatever as affecting Captain Lunt's evidence; it furnishes a key, however, to Mr. Bird's character and credibility when we find him repeating it, and when we see how he treats the matter of date on cross-examination.

Mr. Bird's narrative is, that one evening, in the yacht Ambrotype, crossing from East Boston to Long Wharf, the wind being light, he thought a large steamer, which turned out to be the Java, would run into him; he heard the order to let go the anchor, which was done, and the steamer brought up, thereby saving a collision.

In Mr. Lunt's account, one familiar with the harbor would be at once struck by the statement that he had got up as far as East Boston Ferry; and the question would occur what he was doing there, above the dock of the Cunard ships.

Following Mr. Bird in cross examination (15 to 30, pp. 76–78), it is evident that he is sensitively aware of the importance of this fact; and when he pretends that because it was dark and he did not look that way, he, a boatman in Boston harbor, cannot tell whether the steamer was three times her length, or fifty times her length from her dock, he cannot expect credit for his story.

The attendance of this witness was procured by Lunt, who talked over the matter with him for the first time since the week it happened, a few days before he testified. Cross 3, 4, 5, 6, p. 75. Int. 19, p. 77.

But he swears that Capt. Lunt did not mention the year in which it happened, nor the steamer's name, nor the time of day, nor of tide, nor the place, nor any other fact or circumstance relating to the case. Cross, 31, 34, p. 18.

Improbable as this is in itself, it becomes incredible when we find the witness repeating Lunt's error in the date 1866, and finally declaring, as reckless as to time as he is to distance, that he "don't know whether it was '56 or '66."

Now, with how plain a tale this story is met by Captain Moodie and Captain Browne, on their return from England, after they first hear of it.

The steamship Java never was in Boston harbor until November 7, 1866, the day of her collision with the McCloskey. July 2, 1866, she was in New York.

July 2, 1867, she arrived in Boston harbor in the evening; she did not go to her dock that night, *because it was occupied by the steamship China*, which sailed the next morning at ten o'clock.

The Java came up the harbor, knowing this fact from the tender which met her below, and expecting to come to anchor in the upper harbor; she anchored off Union wharf, between that and Battery wharf, landed her passengers and mails, and docked the next morning.

In coming up the harbor, Captain Moodie was on the bridge, and Captain Browne was on the lookout on the forecastle; both distinctly and positively swear that they did not anchor in order to avoid a collision; that they never heard of any danger of a collision that night, and saw no vessel with which they were in any danger of collision.

They are equally explicit in their denial that the ship was brought to anchor while running at two or three knots; Captain Browne stating that Captain Moodie and himself always have stern-way on before anchoring; and being perfectly confident that he never does such a thing as to anchor when the ship is going ahead two or three knots.

Captain Moodie states that his recollection of the anchoring of the Java that night is distinct: "It was the first and only time the ship ever anchored here while I was in command of her"; "her head was up stream and she was dead stopped; her engines were reversed so that the way of the ship was entirely stopped; had a little stern-way at the time the anchor was let go, — being flood tide she swung to her anchor in a few minutes and brought up in that way."

The fact that the China being in dock occasioned the anchorage of the Java, is proved by the log; the exact location of the anchorage, considerably above the ferry and between Union wharf and Battery wharf, at the extreme upper harbor, is proved by the photograph taken before she raised her anchor the next day. 2 Browne, p. 171, 172. 2 Moodie, p. 174, 175.

And so ends the story of the Ambrotype.

It occasioned us to recall Captain Moodie and Captain Browne, and enabled us to add their testimony to that of the other experts as to the practicability of bringing a 2,700 ton steamship to anchor while under headway.

And it enables us to say, that the libellants having put upon the witness stand their single expert, a pilot, whose boat has been in collision with one of the Cunard ships, and has been put out of commission because she is alleged to be unseaworthy, and will not wear nor stay, who has quarrelled with the commissioners and his fellow pilots, and had his commission revoked, and who, therefore, may be assumed to have no good-will towards the respondents or their witnesses, does not venture to ask this witness a single question as to the safety of the channel inside the school ship, the propriety of crossing at an acute angle a ship's stern at anchor, or even the safety or propriety of anchoring the Java, under the circumstances of the case which actually did occur, between her and the McCloskey.

We claim, then, to have maintained the three propositions first laid down, viz.: —

1st. *That there was no want of due precaution on the part of the steamer in not discovering the schooner sooner than she did.*

2d. *That the steamer was not in fault for the course which she took towards her dock, nor for the manner in which she pursued that course.*

3d. *That the steamer used all proper measures and due diligence and skill to avert the collision, after discovering the schooner and the imminence of the danger.*

And if these propositions be maintained, this case is broadly distinguishable from any of that long line of decisions of the Courts of the United States referred to in the opinion of the Judge of the Circuit Court, as holding steamships liable for collision with sailing vessels, in this: that here no direct fault can be attributed to the Java in any one particular; while in

each of the cases cited some direct, positive fault is pointed out as the ground of liability.

St. John vs. *Paine*, 10 *How.* 557, is a case where the steamer was held in fault for not keeping a good lookout, and for starboarding instead of porting her helm. pp. 584, 585.

The Genesee Chief, 12 *How.* 443, is a case of collision between a steamer running eight miles an hour and a sailing vessel running two or three miles per hour, which was discovered by the steamer four or five miles off; and the Court found that the steamer kept no proper lookout, and used no proper caution in approaching the vessel after discovering her. pp. 460, 462.

The Oregon, 18 *How.* 570, is a case where the steamer saw the sailing vessel at a distance of a mile and a half or two miles, and neglected to port her helm.

The Isaac Newton, 18 *How.* 581, is another case of liability for want of vigilant lookout; the Court says: "*But the fault was in not discerning the schooner before getting into that position.*" "*The steamer, therefore, made for this passage, not only without first ascertaining it to be clear, but without discovering the sails of the schooner, which might and ought to have been seen*" p. 584.

S. S. Co. vs. *Rumball*, 21 *How.* 371, is a case where a steamer discovering a sailing vessel's light at least three miles off, failed to take the needful precaution to avoid her.

Union S. S. Co. vs. *Va. S. S. Co.*, 24 *How.* 307, is a case where direct negligence in several particulars is found, — among others want of vigilance, and starboarding instead of porting the helm. p. 314.

The Granite State, 3 *Wall.* 310, is a case of damage to a vessel properly moored at a wharf, by a steamer entering her dock in a dark night and going "*strong ahead.*" It was held that the darkness did not excuse the steamer, and render the case one of inevitable accident. Plainly because the darkness

was a source of danger apparent, palpable, and one which it was in the power and within the duty of the steamer to guard against, by adapting her speed and course with reference to it.

The Carroll, 8 *Wall.* 302, is a case in which, upon her own testimony, the steamer made the light of the sailing vessel at a distance of four or five miles and omitted to take any measures to avoid her until within a mile, which proved to be too late. p. 306.

The Corsica, 9 *Wa'l.* 630, was decided against the steamer on the ground that she changed her course when she should have kept it, and was running at too great speed.

The City of Paris, 9 *Wall.* 634, was a case of a steamship entering a narrow passage between vessels in a crowded thoroughfare, without first observing it to see if it was clear, and running at a speed of seven miles an hour, which was held too great.

The Alleghany, 9 *Wall.* 532, and *The Syracuse*, 9 Wall. 672, are cases of recklessness in running at too high a rate of speed.

The Fanny, 11 *Wall.* 238, is a case where the steamer discovering the schooner's lights at three or four miles off, in an open bay, took no measures to avoid her until close upon her. p. 242.

The City of New York, 1 *Cliff.* 75, was a case of negligence in the lookout.

The Governor, 1 *Cliff.* 93, was a case of a steamer discovering a schooner at a distance of two miles in a clear day, and with unobstructed navigation, and doing nothing to avoid her until collision was inevitable.

The John Adams, 1 *Cliff.* 404. is the case of a vessel properly moored at the wharf run into by a steam ferry boat in a dense fog. 1. The danger from the fog was apparent, and should have been guarded against. 2. The lookout was found not to have performed his duty. pp. 410, 411.

The Maria Martin, 1 *Chic. Leg. News*, 57 is a case in which the steamer was held in fault (1.) for not porting her helm until within half a mile, though she discovered the barque two miles

off; (2) for attempting to pass a moving vessel in the night at the distance of one hundred feet, in a river frequented by tugs and with tows, when there was plenty of room to keep at a greater distance; (3) for not slackening speed in a narrow river upon making the light of another vessel in the night time.

The Russia, 3 *Benedict*, 471, is a case of a steamer entering a tide rip plainly visible, the action of which, bringing her into collision with a vessel at anchor was to be reasonably anticipated, p. 474.

If we have shown that no one of the faults for which a steamer has been condemned in any case upon this long catalogue can be attributed to the Java, we might almost claim exemption from liability on this ground alone. We claim to have added positive proof of extreme caution, vigilance, and skill in every particular, and, thus assuming an equal or due care or skill on the part of the schooner, to add the case of the Java to the shorter list of cases of inevitable accident within the definition and the authorities already cited. Brief, pp. 4, 5.

That in case of collision by inevitable accident, the loss rests where it falls, and neither party can recover, we cite, —

Union S. S. vs. Va. S. S. Co. 24 How. 307, 313.
The Morning Light, 2 Wall. 550.
The Brooklyn, 4 Blatch. 365.

D.

But the respondents further claim that the schooner was herself in fault:

1st. For not discovering the steamer earlier than she did.

2d. For allowing herself to be concealed by the school ship, while she was herself in motion, without being under canvas so as to be discoverable, or under steerage way so as to avoid a collision.

3d. For not taking prompt measures to avoid the collision after it became imminent.

(1.) *The schooner should have sooner discovered the steamer.*

The master of the schooner swears positively, that *he had a lookout.* E. Crowell, 18, p. 49.

His own testimony and that of his son, the mate, the supposed lookout, shows that this statement is false, unless a man engaged in hoisting a foresail can be called a lookout.

Captain Crowell says, when the schooner was first discovered, the mate "was forward; all of them were forward; he was hoisting a foresail." Then, perceiving the bearing of the question, he qualifies his answer: "I don't know that the mate was hoisting; the mate don't generally" work, but lends a hand once in a while. Cross, 3, p. 51.

But again being interrogated as to hoisting the peak, and deeming it desirable to prove that the peak was being hoisted, he says:—

"Yes, they were hoisting foresail; I don't know whether they were hoisting the peak or throat; I calculate they were hoisting both; there were men on both sides, and they generally hoist both at the same time." Cross, 8; p. 52.

The mate, P. T. Crowell, states his share in the hoisting of the sail more fully:—

"We all hoisted up the throat while the tug-boat was hold of us; when the tug-boat let go, me and another man hoisted on the peak, and the cook and another man were hauling on the line"; p. 56. And in answer to the direct interrogatory, "What were you doing when you saw the Java?" he says, "Hoisting the peak"; 21, p. 56. On cross-examination he attempts to make out a case of being "forward," of "looking down the harbor," "looking ahead"; cross 14, 15, p. 59. But it turns out that being "forward" means at the fore-halliards and looking down the harbor while hoisting the foresail. Cross 14 to 25, p. 59, 60. Finally, to cross-interrogatory 34, p. 61, he admits that "there was no one stationed in particular" as a lookout;

leaving Captain Crowell's statement that he had a lookout disproved.

The master nowhere states that he was himself looking down the harbor; and does state that the steamer was first discovered forward. Cross, 27, p. 53.

This want of a lookout while getting under way in leaving a harbor so frequented as the port of Boston, is in itself negligence.

The Catharine *vs.* Dickinson, 17 H. 170.
Whittredge *vs.* Dill, 23 H. 448.

Nor does the fact that the steamer did not discover the schooner by reason of the interposition of the school ship absolve the schooner from the charge of negligence.

A steamship like the Java, with her funnel twenty feet higher than her bridge, so that she was in all fifty-two feet above the water, and letting off steam all the way up the harbor with a noise which could have been heard at least half a mile would have been discovered by any vigilant master or lookout. Moodie, 2, p. 94; 28, p. 96.

Even when the Java came out by the stern of the school ship she was not discovered by the mate until her full length was exposed to view, which even at the acute angle at which she was passing must have been, at her low rate of speed, an appreciable length of time. P. T. Crowell, cross 40, p. 57.

The reply may be made to this allegation that it was of no consequence whether the schooner made discovery of the steamer a few seconds earlier or later, as she was helpless when the discovery was made or could have been made.

But if the claim on her part, that she was under steerage way is sustained, the few seconds between the time when the Java's bow came out and her whole length became visible, made all the difference between a collision and an escape.

2. *The schooner, by drifting alongside the school ship without canvas to render her visible, or steerage way to enable her to avoid accident, put herself in fault towards the steamer, which took this passage rightfully, knowing that it was clear when she was at the Upper Middle, and having the right to assume that any vessel coming into it would be visible and under control.*

That the condition of the schooner, her not being under canvas, was the cause of her not being discerned, has been already shown.

Whether she was, or was not under steerage way is, perhaps, more closely in controversy than any question of fact in the case.

Of course, her master and mate state that she was so; the master says she was going through the water three knots, and with the tide, one knot more; that she had not lost the way the tug gave her. E. Crowell, 21, p. 49.

If his statement on cross-examination (48, p. 55), that the tug had left him a quarter of an hour before; or Captain Nickerson's statement that the tug left him one thousand yards above the school ship (32, p. 26), approximates the truth, this reason assigned to establish his headway does not go for much.

And that the tug did not bring the schooner any great distance towards the school ship, and had left her some time before the collision, is confirmed by the fact that neither Captain Gardiner, in the Pawtuxet, or Captain Fengar, in his boat, saw anything of the tug, though both saw the schooner ahead of the school ship at some distance. E. C. Gardiner, cross 36, p. 119. Fengar, cross 4, p. 123.

The mate also says she had way on her two or three knots through the water, and that the foresail was filled by the wind.

Pennington, on board the school ship, says the schooner was under steerage way because she answered her helm and went to port, and Nickerson, from Central wharf, says she was under steerage way because "She had a leading wind and proper sail on to give her steerage way."

But he says the schooner did not pay off to port, and so contradicts Pennington's reason for his opinion. Cross, 33, p. 29.

Capt. Kelly is called by the libellants to show that the McCloskey is a vessel quick at the helm, and that with a fair wind of three or four knots, and foresail two thirds up, she *ought to be* under steerage way.

But on cross-examination he admits, what is perfectly obvious to any one in the least degree familiar with the subject, that whether or not she *would be* under steerage way would depend upon the fact whether her fore-sheets were hauled aft or not; and a re-examination by Mr. Dana fails to disturb his testimony on this point.

"If the wind is right square abeam, with the sheets off as far as they could go, the foresail would do but little good." "If the foresail don't do any good, I should not consider her under steerage way." Cross 4, 3, p. 71. Re ex., 19, 20, p. 72.

There is no testimony in the case showing that the fore-sheets were drawn aft; and it does not need proof that a light crew would prefer to hoist a foresail without having it filled with the wind.

The testimony from the steamer is very full to the point that the McCloskey was drifting down with wind and tide, and not under steerage way.

The opportunity for observation and knowledge upon this point is of course in favor of the crew of the schooner above all other witnesses; but only two of them are produced; and any perusal of their depositions, however cursory, or however careful, will show how little they can be relied on.

Brown says, she was "drifting down with the tide." (13, p. 81.) "She was not under steerage way." (23, p. 82.) "If she had been, she could easily have avoided the collision by starboarding her helm, and going clear." (24, 25, p. 82.)

Moodie says, she "appeared to be just drifting with the tide; not under proper command." (15, p. 95.) If under way she could have avoided the collision by starboarding. The collision was occasioned "by the McCloskey not being under proper command and steerage way." (30, 31, 38, p. 96.)

Coffin says: "She was drifting down with the tide and what little wind there was, — not under steerage way." 15, p. 103. "If under steerage way she could have avoided the collision by starboarding." 27, p. 103.

C. L. Gardiner says: "She was hoisting her foresail, but she did not have steerage way, I think." 13; p. 107.

Captain Martin says: "She was drifting with the tide, very little headway, not steerage way at all; she was going through the water scarcely any, merely drifting with the tide, not having commanding way on her." 15, p. 128.

The two witnesses from the Pawtuxet confirm these statements.

E. G. Gardiner says: "She was drifting," "sagging down towards the school ship"; that she was not under steerage way; that "her foresail bellied out, but did her no good"; that if she had been under canvas or steerage way she would have gone clear. 8, 9, 10, 11, p. 114, 115.

Captain Fengar says: "The schooner had not sufficient sail on to have steerage way, to have control of the vessel"; "she was drifting"; "*the sail not drawing but the wind spilled out of it*; she continued drifting, not having headway enough to be governed by her wheel up to the time of the collision; there was nothing done by her to avoid the collision; she had not steerage way, no control." Fengar, 6, p. 121.

Again, we contend that upon this point, as upon the other disputed facts, the weight of evidence greatly preponderates in our favor.

That the schooner was thus drifting, and not under steerage-was, under the circumstances, a fault as well as a misfortune.

She had come from the Shears wharf, which is next the Cunard dock (Nichols, 20, 21, p. 35); and, as her master says, had been half an hour away from the wharf; she had ample time to get under way, and, as Captain Kelly says, ought to have been.

We deny, then, her right to come out, unobserved and unobservable, by the stern of the school ship, moving without the *indicia* of motion, directly in our track, helpless herself, and thrusting herself in our way without giving us an opportunity to discover or avoid her.

In this respect, the case is distinguished, as Mr. Justice Lowell says, from *Crockett* vs. *Newton*, 18 *How.* 581; and the distinction is vital.

This case comes within the case supposed by Judge Betts, in *The New Jersey, Olcott* 415, 426.

"*Negligently interposing a vessel in the track of another, under circumstances preventing her extricating herself, renders the collision the wrongful act of the vessel so interposed.*" The Wings of the Morning, 5 Blatch. 15.

(3.) *And finally, upon the libellants' own showing, if the McCloskey was under steerage way when she discovered the steamer, she was in fault in not seasonably, that is to say, immediately, starboarding her helm.*

The testimony on this point comes wholly from the master of the schooner.

The mate says he does not know whether anything was done to the helm of his vessel, or whether she fell off or not. P. T. Crowell, 31, 32, p. 57. Cross, 49, 50, 51, etc., p. 61, 62.

If the master is to be believed in any statement, he is to be believed in this, and the libellants are bound by his statement, that *he did not put his helm hard to starboard as soon as he could after he saw the steamer, nor until just as she struck.*

The statement is clear and unequivocal. E. Crowell, pp. 52, 53.

Cross-Int. 17. Then when you discovered the steamer you put your helm hard to starboard, so that the schooner fell off two points, did you not?

Ans. I didn't do that till just as she struck us. I saw her right over my head, and did that, and jumped out of the way, so that I shouldn't get hurt; it wasn't a second, I suppose.

Cross-Int. 18. Did you not put your helm hard to starboard just as soon as you could, after you saw the steamer?

Ans. No, sir.

The direct examination resumed, confirms the original statement. 47, p. 55.

Now the reason assigned for the delay is not only false, but the falsehood and the attempt to sustain it, affect the credibility both of master and mate, and their supporter, Captain Nickerson.

If there is any fact proved in this case, it is that there were no vessels at anchor inside the school ship on the way up to the Cunard dock, but that there were five or six ahead of the school ship, to the westward.

The pilot's reason for taking the inside course was, that there were no vessels inside at anchor; and every witness on board the steamer, and Captain Fengar, and Captain E. C. Gardiner, establish the fact.

But Captain Crowell, pressed to assign a reason why he did not starboard his helm, creates on the spur of the moment a group of vessels at anchor directly under his lee at the time he discovered the school ship, so that he could not starboard without running into them. Cross, 43, 44, p. 54.

As usual, in giving the particulars about these vessels, Captain Crowell gets into confusion; and having stated that the nearest one was very nigh abreast of him when the steamer struck, he says she was five or six lengths off when he first saw the steamer, specifying that by lengths he means length from end of jib-boom to end of main-boom, which was three hundred feet. 45, p. 51. Cross 44, p. 54.

A schooner under the lee, 1,500 to 1,800 feet off, would seem a poor excuse for not starboarding the helm of a centre-board schooner under way and quick at the helm.

These vessels were mentioned for the first time in this cause at cross-interrogatory 43 of Capt. Crowell's deposition, cross 46, p. 55.

The attempt is made to sustain Captain Crowell in this story by his son, the mate. He undertakes to remember two vessels at anchor; but they were *in on the flats;* and consequently could not have been in the way of the McCloskey. P. T. Crowell, 54; p. 58.

That he had talked over the matter of these vessels with his father, and the matter of starboarding the helm in connection with it; and that he was extremely sensitive about that conversation, and evasive in his answers about it. and that it was the attempt of one stupid witness to induce another to support him, is plain enough in reading the examination, cross 51 to 76, beginning with his statement that he "don't like to answer the question" about starboarding; and ending with an admission that the conversation, the date and substance of which he could not remember, but which was about these vessels and starboarding, was within a week or thereabouts of the time of giving his testimony.

After all, as might be expected, he fails to assign to the vessels any such position as interfered with starboarding the helm.

Horace Nickerson, *examined some months after these witnesses,* though in the record his deposition precedes theirs, is hardly pressed to support them by recollecting these vessels.

The record shows that, on direct examination 18 to 27, the interrogations and answers covering a space of nearly two pages, with much labor and difficulty the witness was induced to put two vessels at anchor somewhere in the inside track of the steamer, some way *above the school ship,* a third of the way from the school ship to the wharves; that is to say, directly in

mid-channel on her way up; "in a line with the school ship and the Java's wharf; a little inside, as nigh in the track as they could put them, I should think." Nickerson, 25, p. 25.

Unfortunately this does not in the least help Captain Crowell; and on cross-examination the witness disposes of the whole story.

Cross 7. Were not those vessels in Captain Crowell's way as he went down the inside passage?

Ans. No, sir.

Cross. 8. Did they not in any way interfere with his management of his vessel?

Ans. No, sir; because he had steam to carry him where he wanted to get clear of them.

Cross. 9. Did he pass them while in tow of the tug?

Ans. Yes, sir; that's the way it looked to me.

This witness betrays the same sensitiveness as to the time when, and the person by whom his attention was called to these vessels, as was shown by the captain's son. Cross, 11 to 27.

And so fails the second attempt of Capt. Crowell to support the fictitious cause assigned by him for not putting his helm to starboard.

That the collision would have been avoided if the schooner was under steerage way, by putting her helm to starboard a very short time before it was done, is too obvious to need proof or argument; and if Capt. Crowell neglected so doing without excuse, it was a fault for which his vessel is bound, unless he is excused on the ground of the immediate imminence of the danger, and that danger is proved to have been induced by the fault of the Java.

E.

Comparison of witnesses as to character, competency, and credibility.

It has not been deemed necessary, nor is it possible, in this discussion of testimony, to display the numerous absurdities in

the testimony of the witnesses from the libellants' vessel, or their assistants in the case, Messrs. Judah Baker and Horace Nickerson; because it will be sufficiently apparent upon the face of the depositions, that the counsel examining them has been throughout as much embarrassed by their inability to state the simplest facts relating to the collision, as the Court will be in giving any intelligible shape to the result of that examination.

It may be contended that more weight should be attributed to the testimony of the two witnesses of the collision from on board the school ship, and that the observations of these two, Jenkins and Pennington, are entitled to more consideration than has been given to them.

With no reason to doubt the fairness of these witnesses, it is contended that their competency to observe, or at all events to narrate the facts of the collision, seems but one grade above that of Capt. Crowell and his son. In illustration, we would refer to the attempt on the part of libellants' counsel to obtain from Mr. Jenkins, by means of blocks, the positions and angles of the two vessels at the time of the collision, and the answer (24), p. 17, "*they are both of them at different angles apparently; I should think the angle of the Java was four or five points, and the angle of the schooner was less, if anything.*"

No wonder that the next interrogatory was elementary, viz.: "*How many points are there to a right angle?*"

The ingenious suggestion of the counsel that, in answer to the 24th interrogatory, the witness intended to give the angles made by the steamer and the schooner severally, with his own ship (27, p. 17), is indignantly repelled by the witness, who says he referred "to the steamer and the schooner"; and he doubtless, to this day, insists that they were at different angles with each other.

The illustration selected is believed to be pertinent; for how can the Court judge what is seen, or what is intended to be stated, by a witness who thus commits himself to paper? And

when this witness, alone of all who have been examined, states that the schooner headed, in her downward course, in towards the school ship, at an angle of 45 degrees, so that "*the angle between the starboard sides of the two vessels was a little over forty-five degrees,*" it is difficult to say whether he is wanting in accuracy of observation, or of statement.

When he says that Slate Ledge buoy, in sight of which he had passed two years, is two miles below the school ship, while Boschke's chart gives the distance as but little over half a mile, the fault is not in the mode of expression.

Are we not entitled, in comparing the testimony of such witnesses, to claim for the skill, training, experience, and original capacity of such men as Moodie, Martin, Browne, C. L. Gardiner, and Fengar, not only a superior capacity for stating what they saw, but for really seeing what occurred? Are they to be put on the same footing with Captain Crowell, who seems to have the stolidity of the wooden figure-head of his own craft, or his son, who, by hereditary transmission, appears to possess all the qualities of the parent block?

In regard to the testimony of the pilots, who have been called as experts, it will be attacked as the testimony of a class testifying for one of their class.

We reply, that we know no such competent judges of the proper, safe, and prudent course for a steamship to pursue, on entering a harbor, as those men to whom by law and the usage of the maritime world is entrusted the sole charge of navigating and managing them in so doing; and that this source of testimony was equally open to the libellants as to us; since it is believed there is no class among whom more rivalry and jealousy, from the very nature of their calling, must exist.

If there be any better class of experts to be found, the respondents, at all events, have not taught us where to find them.

We again call attention to the fact that in a cause involving many questions of nautical skill and judgment in the navigation

of a steamship up Boston harbor, with the whole field of expert testimony before them, the libellants have not offered, to aid the court, the opinion of a single witness competent to undertake the navigation of such a ship, there or elsewhere, and have neglected to examine upon those questions the one competent witness whom they placed upon the stand for another purpose.

In regard to the witness on whom lies the responsibility of this case, so far as the management of the steamship is concerned, the pilot, Captain Martin, we ask the closest scrutiny as to the matter and the manner of his testimony; and we further ask the Court to consider that his opinion, his judgment, his testimony as an expert, were given in this case not for the first time, when he appeared as a witness upon the stand; but that upon the deck of the steamship, under all the responsibility of her navigation, and with the safety of the lives and property in his charge, and his own reputation at stake, he formed and expressed, in act, that judgment and opinion which, as a witness, he has now sworn to before the Court.

That judgment we have confirmed by the opinions of six accomplished ship masters, Capts. Moodie, Browne, Coffin, Fengar, and the two Gardiners, and by six pilots of the port; the questions upon which these opinions are given are practical questions, which it is the duty of these men to solve in their regular avocation in life: we respectfully ask leave therefore, as our right and our duty, to offer their experience in aid even of this tribunal.

WILLIAM G. RUSSELL,
for Appellants and Claimants.

THE JAVA.

District Court of the United States.
DISTRICT OF MASSACHUSETTS.

OPINION OF JUDGE LOWELL.

Lowell, J.—The libellants were the owners of a valuable cargo of linseed, which was shipped on board the schooner James McCloskey, bound from Boston to New York. The schooner was towed from one of the wharves in East Boston into the stream, and was getting under way near the school ship George M. Barnard, and had only a part of her foresail hoisted, when her master saw the large Cunard propeller steamer Java coming round the stern of the school ship and making directly for the schooner. The schooner's helm was put hard-a-starboard, but the steamer struck her abaft the main rigging and knocked a hole through her, and the linseed was damaged to the amount of some seven thousand dollars.

There is no doubt or question concerning most of the facts of the case. The weather was clear and fine, with a good breeze, the precise direction of which is not important, the time about one o'clock in the afternoon, the tide an early ebb, and neither vessel was seen from the other until just before the collision. The questions which arise are, whether, under the circumstances, either or both vessels were guilty of any negligence which caused, or aided in causing, the collision.

The burden of proof is on the steamer. And the first question is, whether her lookout was sufficient. It is shown tha

she had three persons properly stationed forward on the lookout, and the evidence is, on the whole, quite clear and decisive that they were vigilant and discovered the schooner, not only as soon as she discovered the steamer, but as soon as with reasonable diligence they could have discovered her. It appears, too, that the steamer was proceeding very slowly, having stopped her engines some little time before to make sure of clearing another vessel, and that upon the schooner being seen, prompt and efficient measures were taken to clear her, but that it was too late.

The allegation to which most of the evidence and arguments have been addressed is, that the Java was in the wrong in attempting to pass on the inner or East Boston side of the school ship when and as she did.

It appears that the George M. Barnard is a large vessel, high out of water, which is kept constantly moored during the winter months near the edge of the channel, leaving as much room as possible on the outside between her and Boston, and only a narrow passage on the other side, so that a vessel of the size of the Java could not pass there excepting at or near high water. There was evidence tending to show that the Cunard steamers rarely do take this passage, though other vessels nearly as large do so not unfrequently, and that it would not be considered prudent for so large a vessel to attempt it when it was much obstructed. The fact that vessels of large size do or do not frequent the place is of little importance compared with more direct and pertinent evidence concerning the safety of the passage itself. That Cunard steamers rarely go there might be material in ascertaining whether the schooner in getting under way in that part of the channel had any reason to expect to meet the steamer there, and so bear upon the diligence, or want of it, on the schooner's part, and upon that ground I admitted this testimony; but it has not become material to the decision of the cause. Upon the whole evidence I am satisfied that a prudent and skilful navigator would not hesitate to take the Java

through that passage at that state of the tide, if he saw no obstructions, as of vessels at anchor, or the like.

It is said that if the steamer had taken a course more nearly parallel with that in which the school ship was lying she would have seen the schooner earlier, and might have avoided her; and this is true. But whatever direction she had taken, the school ship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another. The case is simply one of running under the stern of a vessel at anchor at a somewhat acute angle, and I am not prepared to say that this is bad navigation, if it be done as slowly and with as much vigilance as is shown in this case. A man may drive round the corner of a road, if that is the most convenient way home, though he ought to do it slowly and with more than ordinary care, if he cannot see what is on the other side. The failure to see the schooner probably arose from the fact that her sails were not set. I am not prepared to say that this was any fault on her part, but it was her misfortune.

A consideration of a good deal of weight with my mind in one aspect of the case is this: That the collision does not appear to have been affected in any degree by the narrowness of the channel. The steamer was simply coming out from behind the school ship in one direction and the schooner in another, and however wide the channel might have been, the former could have done no more than she did. She took the proper measures promptly and without the slightest embarrassment from the narrowness of the passage between the ship and the flats, which in fact she had scarcely reached. So that I cannot see that the propriety of the steamer's course considered with reference to the peculiarities of this passage has much importance in the case. Nor is the fact that she intended to go to the Cunard dock very important, because she was not heading for the dock when the collision happened. It seems that the accident might

and would have happened just as it did if the steamer had been going to any other dock, and the school ship had been anchored in mid-channel, provided the relative position of the three vessels had been the same. So that it comes back, as I have said, merely to the question of running under the stern of a vessel at anchor at an acute angle. And I cannot say that any negligence has been shown on the part of the officers of the steamer, but must hold that this accident, though occurring in broad day, was what the law terms an inevitable misfortune. The distinction between this case and Crockett *vs.* Newton, 18 How. 581, is precisely in the sails of the schooner not being visible over the school ship.

Decree for claimants.

R. H. Dana, jr., for libellants; W. G. Russell for claimants.

JUDD LINSEED AND SPERM OIL COMPANY

vs.

THE STEAMSHIP JAVA.

CIRCUIT COURT OF THE UNITED STATES.
DISTRICT OF MASSACHUSETTS.

OPINION OF SHEPLEY, JUDGE.

The libel in this case is brought by the owners of a cargo of Linseed, which was shipped on the Schooner James McCloskey, and damaged to the extent of about seven thousand dollars in consequence of a collision in Boston harbor, between the schooner, and the steamship Java, of the Cunard line.

Libellants claim that "the steamship caused the collision by not seasonably altering her course, and by not seasonably stopping and backing her machinery, and by her unusual and venturous navigation, or by one or more of said faults."

The claimants contend that a good lookout had been kept by the Java during the whole time she was coming up the harbor, that it was impossible for her to discover the schooner sooner than she was discovered, owing to the fact that the school ship George M. Barnard was interposed between her and the schooner — that immediately upon discovering said schooner, the helm of the Java was put hard to starboard, and her engines were reversed at full speed, and that all that was possible to be done was done aboard the Java to avoid the collision — that at the time of the collision the speed of the

steamer was so reduced as not to be equal to that of the schooner drifting with the tide.

They also contend that there was fault on the part of those in charge of the schooner, in allowing her to drift without being under steerage way, and without sail set, and concealed by the ship George M. Barnard into the way of the steamship; and that if the schooner had been under sail, so as to have answered her helm, she might, by putting her helm to starboard, even after the schooner was discovered by the steamship, have avoided the collision.

The answer also claimed exemption of the steamship from liability by reason of her being an inward bound ship in sole charge of a pilot, taken on board under a compulsory statute of Massachusetts. This ground of defence was not relied upon in argument, it not being considered an open question in this Circuit since the decision in Camp vs. Marcellus, 1 Clifford, 481.

The undisputed facts in the case are that the schooner, between the hours of twelve noon and one of the afternoon, of November seventh, 1866, was towed from one of the wharves in East Boston into the stream, and was getting under way near the school ship George M. Barnard, having her foresail partly hoisted, when her master saw the Java coming round the stern of the George M. Barnard, heading directly towards the schooner. The schooner's helm was put hard-a-starboard. The steamer was proceeding very slowly, having stopped her engines a short time before, in order to avoid a collision with another schooner which had passed down the harbor inside of the George M. Barnard and ahead of the James McCloskey. Immediately upon seeing the McCloskey, the helm of the Java was put hard-a-starboard and her engines were reversed, but the steamer struck the schooner abaft of the main rigging and knocked a hole in her, whereby the cargo of linseed was damaged. The weather was clear and fine, with a good breeze from a westerly direction. The tide was from one

to two hours ebb, running from one and a half to two knots an hour. The Java, a propeller steamer of twenty-seven hundred tons burthen, three hundred and sixty feet in length, drawing about nineteen feet of water, was coming up the harbor to her dock in East Boston.

The McCloskey was a fore and aft schooner, one hundred and twenty-one feet long, proceeding down the harbor from her wharf at East Boston.

The school ship is a large vessel, light and high out of the water, which, during the winter months, was kept constantly moored near the East Boston side of the channel, leaving a large space on the outside between her and Boston, and a comparatively narrow passage on the other side, between her and East Boston. Vessels of the size of the Java rarely take this passage because they could not pass inside of the school ship excepting at or near high water. But the evidence shows that at the state of the tide at the time of the collision, it would be prudent and safe for a vessel of the size of the Java to go through that passage if it was unobstructed by other vessels.

It is contended on the part of the libellants, that the Java was in fault in coming up as she did to a point about midway of the channel, "about abreast the Slate Ledge" and "a little above the Slate Ledge Buoy," before she determined whether to go inside or outside the school ship, instead of keeping a course up the harbor more nearly parallel with that in which the school ship was lying, so as to keep open the view of the channel inside the school ship. But, as well stated by the learned Judge of the District Court in his opinion in this case, "whatever direction she had taken, the school ship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another."

It is also contended that the Java pursued an unusual course in attempting to go to her dock by the passage between the school ship and the Bird Island Flats. Much testimony has

been taken in the case upon the frequency of the use of this passage by steamers of the class of the Java, and there is much conflict in the testimony. But it becomes comparatively immaterial in this case in the view we take of it, for two reasons: First, a vessel is not to be considered in fault merely because she takes, for reasons of her own convenience or necessity, an unusual course; but when there is an usual and an unusual course, the vessel taking the unusual course for her convenience does it at her peril, and is bound to see that she does it in safety.

The Fyenoord, Swabey, 374.
The Peerless, Lushington, 31.
The Falkland Br. v. Lushington, 204.
The Roanoke, 19 Howard, 241.

Secondly — The collision might and would have happened as it did, had the school ship been anchored in any other place, provided, the relative positions of the three vessels in reference to each other had been the same.

It therefore seems properly to resolve itself into a consideration of the duties and liabilities of a steamship running under the stern of a vessel at anchor, at an acute angle, considered in reference to the possibilities of a small sailing vessel passing at the same time behind the vessel at anchor, which was so large and high out of water as to intercept the view of a small schooner, tug boat or flat boat in a channel or passage much frequented by small vessels.

It is urged that the steamer under these circumstances proceeded very slowly and with a vigilant lookout, and therefore as the schooner was not seen from the steamer in season for those in charge of the steamer to avoid the schooner, the collision must be considered in the light of an inevitable accident.

But it seems very difficult to apply the term inevitable accident to a collision occurring under such circumstances, at mid-

day and in fine weather. The steamer was not disabled, and nothing happened which she was not bound to anticipate as possible at least, if not probable.

A collision is properly regarded as the result of inevitable accident "which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent its occurrence." Union S. S. Co. v. Va. S. S. Co. 24 Howard, 313.

"If," says Dr. Lushington in the *The Plato vs. the Perseverance*, "the accident could have been avoided by ordinary skill, diligence and precaution, then it is not an inevitable accident."

There is always a period of time before the actual collision when it is inevitable — when skill, diligence and precaution are unavailing — because too late.

"Precautions," says Mr. Justice Clifford, in the case of *The Governor*, 1 Clifford, 93, "must be seasonable in order to be effectual, and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity for precautionary measures was not perceived until it was too late to render them availing."

The school ship for many years had been constantly, during the winter months, kept moored in the same position near the edge of the channel. She was large and high out of water. The pilot of the Java knew her position, and that the view of a small sailing vessel might be shut out by the school ship.

The steamer was bound to guard against the emergency. If she went under the stern of the school ship at an acute angle under such circumstances, she was bound by law to proceed so slowly and with so much vigilance that she could keep out of the way of a sailing vessel. Any degree of speed or any want of vigilance which left her powerless to prevent a collision with a sailing vessel after it was seen, which she had a right to expect to meet in the position in which it was first seen, was a want of seasonable and proper precaution, and therefore a fault.

It is said a man may drive round the corner of a road, if that is the most convenient way home, though he ought to do it slowly and with more than ordinary care if he can not see what is on the other side. But suppose one man is driving round the corner of a road where the view is obscured by a high wall or building, and has reason to suppose that there may be coming round the corner in an opposite direction another who has a paramount right of way, who has a right and is under obligation to keep his course while the first man is bound to keep out of his way. Would not this case better illustrate the relative positions of a vessel under steam and one under sail under such circumstances, and in each case would there not exist an obligation to see a clear course before proceeding?

Although, in the case of "*The Isaac Newton*," 18 Howard, 581, the sails of the schooner were hoisted so as to have been visible over the hull of the vessel at anchor, and, in that respect it is distinguishable from the present case, yet the decision was placed by the Court on the ground that the attempt of the steamer to come to her landing between vessels at anchor, without first ascertaining that the track was clear, was culpable, and on that ground she was condemned in damages.

If the night be too dark to distinguish a small vessel in season, a large steamship should not attempt to go down the harbor. The R. B. Forbes, 1 Sprague, 329.

It is not easy to see why the principle is not the same whether the view be intercepted by any large object at rest or obscured by darkness.

To hold the steamer free from fault under these circumstances, would be to relax the rule well settled in the decisions of the Courts of the United States, introducing conflict where there is now uniformity of decision, and establishing a precedent which might lead to danger.

See Oregon v. Rocca et al., 18 How. 570.
St. John v. Paine et al., 10 " 583.

See The Genesee Chief, 12 How. 461.
S. S. Co. v. Rumball, 21 " 372.
The Carroll, 8 Wall. 302.
The Rapid, opinion of Blatchford, J., U. S. Court, S. Dist. of N. York, (not reported.)

The Java voluntarily and for her own allowable convenience, placed herself in a position where meeting a small vessel in a place not unusual and where such a meeting might reasonably have been expected, the Java could do nothing by her machinery, her anchors or her helm to avoid the collision.

We do not perceive that any fault is fairly imputable to the schooner. She came from the dock without her sails being set because they forced her against the wharf. She obtained the assistance of a tug to pull her out into the stream, and with the aid of the tug and the tide came down rapidly to the vicinity of the school ship, and was setting her foresail and had it from half to two-thirds up when she saw the Java. There is no sufficient proof of any unusual or negligent delay in hoisting the sails, or of her being in fault in any other respect.

Decree of the District Court reversed. Decree to be entered for Libellants. Case to be referred to a Master to assess the damages.

R. H. Dana, Jr., L. S. Dabney, *for Libellants.*
W. G. Russell, *for Claimants.*

Supreme Court of the United States.

DECEMBER TERM, 1871.

THE JAVA.

THE JUDD LINSEED CO.,

LIBELLANTS AND APPELLEES.

JAMES BURNS ET AL.,

CLAIMANTS AND APPELLANTS.

BRIEF OF LIBELLANTS.

BOSTON:
ADDISON C. GETCHELL, PRINTER, 53 WASHINGTON STREET

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1872.

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SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

THE JAVA.

THE JUDD LINSEED CO., Libellants and Appellees.
JAMES BURNS *et al.*, Claimants and Appellants.

BRIEF OF LIBELLANTS.

NATURE AND HISTORY OF THE CASE.

It is a cause of collision. The suit is *in rem*, in the district of Massachusetts. The libellants are owners of the cargo of the schooner James McCloskey, which was lost by a collision between that schooner and the steamship Java. In the district court, the libel was dismissed. On appeal in the circuit court, the cause was heard before Mr. Justice Clifford and Judge Shepley, who united in a decree condemning the Java in damages and costs. The claimants appeal to this court.

It is presented to this court on the same testimony that was before the circuit court. The record shows that nearly all the depositions used in the circuit court were taken after the decree in the district court.

If the judges of the circuit court concur in a result depending mainly on facts, this court will not give much force to the suggestion that the judge of the district court came to a different conclusion, as it is well known that the evidence is usually a good deal different in the first appellate court, and usually the same in this court as in the circuit court.

MATTERS NOT IN DISPUTE.

Place of collision, — Boston harbor, on the East-Boston side, near the school-ship George M. Barnard.

Time, — Nov. 7, 1866, about half-past 12, noon.

Wind, weather, tide, &c., — Clear, fine day; moderate breeze from a westerly direction; tide, from one hour to two hours' ebb, and running from one to one and a half knots.

Vessels, — The screw-steamer Java, of the Cunard line, 2700 tons burthen, 360 feet in length, and drawing 19 or 20 feet, coming up the harbor to her dock in East Boston.

The fore-and-aft schooner James McCloskey, 121 feet long, drawing 8 feet; with cargo of linseed, belonging to libellants, going down the harbor from a wharf at East Boston.

No dispute that both vessels were in good condition, with sufficient crew, and all on deck at the time.

The school-ship George M. Barnard was riding at her moorings, which lie as per chart, and swinging substantially as per chart, tailing down stream with the ebb tide; light, and high out of water; draft, 13 feet, and over 200 feet in length, and of about 1000 tons. Her length should be one inch on the chart. It was made less, and is now altered to one inch.

Channels, passages, soundings and lines. — The soundings on Mr. Boschke's chart are at dead low water. The blue line shows, at dead low water, spring tides, 18 feet depth; the red line, 12; and the green line, 6 feet. The school-ship, at this time of tide, lies a few, say 12 to 15, feet inside the blue line. The channel lies between the school-ship and Boston. Between the school-ship and Bird-Island Flats there is water, as per chart. Thirteen feet is to be added to the figures on the chart to give the depth of water at the time of the collision.

Distances. — From school-ship to red line, 380 feet. From school-ship to green line, 535 feet. From school-ship to outer end of Central wharf, 3000 feet; to end of Commercial wharf, 3100 feet; to Cunard dock, 1800 feet. From school-ship to channel opposite Slate Ledge, at "C," 2700 feet, or only 60 feet more than half a mile.

General course of both vessels. — The Java came up the channel to a certain point, when she determined to go inside the school-ship,

and ported her helm, and steered so as to cross her stern, below it. The schooner left her wharf in East Boston, and passed inside the school-ship. The collision was off the starboard quarter of the school-ship.

Measures. —The compass, or circle, is 360°, or 32 points. A right angle, or quarter of a circle, is 8 points, or 90°. Each point, 11° 15′. One mile, 5280 feet; one half mile, 2640 feet; one quarter mile, 1320 feet; one eighth mile, 660 feet; one sixteenth mile, 330 feet; one-thirty second mile, 165 feet.

A.

The Java first saw the James McCloskey across and over the school-ship, the school-ship being between them, and intercepting the view. The Java could not see the McCloskey's hull, but only the upper part of her masts.

I. The answer admits this, p. 12:* "It was impossible for her to discover the said schooner sooner than she was discovered, owing to the fact that the said George M. Barnard was interposed between her and said schooner."

II. The evidence of the claimants proves this: —

Capt. Moodie, in command of the Java; ints. 25 to 29, p. 152; 22+ and 23+, p. 156.

E. G. Martin, the pilot in charge; p. 201, int. 10; p. 202, int. 12; p. 203, int. 17; pp. 209, 210, 15+ to 20+; p. 210, 22+ and 24+.

Browne, chief officer; p. 129, int. 15, and p. 130, ints. 22 and 24; p. 133, ints. 20+, 21+ and 22+.

Coffin, the Halifax and coast pilot; p. 163, ints. 22, 23, 24 and 25; p. 166, ints. 24+, 25+, 26+.

C. L. Gardiner, shipmaster and passenger; p. 170, int. 17.

Fengar, commanding the revenue cutter; p. 192, int. 9. "The schooner was not discoverable." . . . p. 195, ints. 10+, 11+, 15+, 16+, 17+.

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*All the references in this brief are to the marginal pages of the record.

This is the hypothesis put by the claimants' counsel. Int. 19, put to J. T. Gardner, p. 249, int. 19 *et seq.*, assumes that the schooner "had been hidden from view by the school-ship," and that, when discovered, she was "about abreast the starboard bow of the school-ship."

III. The evidence of the claimants as to the angle of sailing also shows that the Java was not coming up on a line which would keep open the passage inside the school-ship, and enable her to see vessels that might come into that passage from above, in season to avoid them; but was coming up to the westward of the school-ship, and on an angle that shut off such vessels from her view.

Browne, chief officer; p. 133, ints. 18+, 19+, 20+.

Coffin, the coast pilot; p. 162, ints. 13, 14.

C. L. Gardiner, passenger; p. 169, int. 10.

Capt. Fengar, p. 193, int. 13; p. 195, ints. 8+, 9+, 10+, 11+; p. 197, 24+. His answer to cross-int. 24 shows that her angle was so great with the school-ship that she had not time to come within an angle of 15° with her, after seeing the schooner.

Slaiding, at the helm; p. 147, 41+.

IV. The officers of the school-ship are the witnesses who best combine disinterestedness and opportunity to see all that occurred, without excitement. They are all strong witnesses for the libellant. The two on deck at the time were Jenkins and Pennington, the 2d and 3d officers.

Jenkins, p. 28, int. 32.

Pennington, p. 33, ints. 12, 13.

V. Other disinterested witnesses.

Capt. William P. Nichols, a man of large nautical experience (p. 59), and his cousin, Mr. Richard C. Nichols, a merchant of considerable experience with ships (p. 51), saw the entire occurrence from the quarter-deck of the ship Nevada, lying at Grand Junction wharves, East Boston. They saw and watched the steamer from below, and saw the schooner come down inside, and, seeing a collision inevitable or almost certain, watched everything closely. They have no interest.

Richard C. Nichols, p. 51, ints. 6–11.

William P. Nichols, p. 60, ints. 12, 16, 17, 18.

Mr. Judah Baker, a highly respected shipmaster and merchant of Boston (p. 66), was walking up from East-Boston Point to the ferry, and saw the Java's course to within a few minutes of the collision.

Judah Baker, p. 67, int. 8; p. 68, int. 11.

VI. Officers of the schooner.

The libellants have been able to take only the depositions of the master and chief mate of the James McCloskey. The two or three seamen testified for the libellants orally in the district court. The counsel for the claimant, who heard their testimony there, will not suggest that we did not wish for their evidence.

Elnathan Crowell, master; p. 77, int. 9; p. 79, int. 31; p. 84, 27+; p. 85, 33+, 35+.

Peleg T. Crowell, mate; p. 89, int. 18, 19, 22, 23; p. 91, int. 39, 42; p. 94, 14+ and 15+.

It is respectfully suggested that this evidence proves the following facts: —

I. That the Java, coming up the channel, and being at some place below, changed her course to go inside the school-ship, was sailing across the channel at an angle of from 35° to 45° with the school-ship, and so that it would be difficult for her to see any craft passing down inside the school-ship. The high and light and large school-ship would conceal them, so that, if seen at all, the Java could not make out their course, or whether they were at anchor or in motion.

II. That, in fact, the angle was such that the schooner's masts were seen from the Java, over and across the school-ship.

The importance of these facts will be seen when we shall have shown to the court the following state of things: —

The passage inside the school-ship is not a channel, but a passage largely used by small vessels. Those vessels, coming from the wharves at the North End or Charlestown, or down the Charles or Mystic Rivers, often come round or cross the head of the school-ship. So, these vessels often come suddenly into this passage from the wharves at East Boston. Also, smaller steamers, lighters, scows, and boats pass or lie at anchor inside the school-ship. (Matthews, commander of school-ship, p. 15, ints. 12, 13, 18.) When the school-ship is not there, no question arises, as there is then only a very wide channel, shoaling gradually as you approach Bird Island. The school-ship is a fixture seven months in each year, and is as well known as an island, and compels vessels to choose whether to keep in the channel or go inside of her.

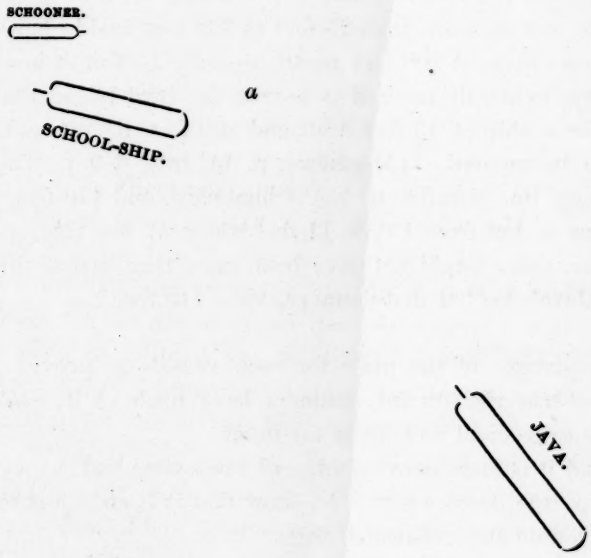
At high tide, a large vessel can go inside, so far as she alone is concerned. The danger consists in her liability to meet vessels, which, in that passage, she cannot successfully avoid. The least dangerous way for such a vessel (and that is not safe), is to go up in a line which will keep the inside passage open to her view all the way. To attempt to make that passage from the channel at an angle with the school-ship, is unwarrantable and hazardous; and, in case of the Java, made a collision substantially inevitable, if the vessel was at all hidden from her before she got down to her.

The important question must be, whether the Java did come up on a line which kept the passage open.

It will be in vain for the claimants to rely on nice mathematical calculations of angles and lines, or on opinions of the most deeply interested witnesses as to bearings they did not take or think of at the time. The admission in the answer, the facts as to the manner and place of discovering the schooner, the angle at which the Java struck her, and the admissions of their own witnesses above referred to, put it beyond doubt that the Java lost sight of the passage during all the most important period, and came across the school-ship's stern at an angle of from three to four points, or from 36° to 45°.

The following drawing represents the Java, school-ship and

schooner, the Java steering to (*a*), a point 100 feet from the school-ship's stern, at an angle of 40°.



B.

The passage inside the school-ship, when she lies there, is dangerous for a screw of the size and draft of the Java.

I. The length and draft of the Java. — It is for the interest of the claimants to make the length and draft of the Java as little as possible, and to make the tide as near full flood as possible. Browne, chief mate, p. 128, int. 6, says "about two hours' ebb." Others put it between one and two. The Java's length is 360 feet. (Browne, p. 135, int. 37.) None of the officers were asked by the claimants' counsel to give the draft. C. L. Gardiner, 171, 1+, puts it at 20 feet. Martin the pilot spoke of it as nearer 19 than 18 feet. The court may well assume it to be 20 feet.

II. The proximity of the school-ship to the flats.

Matthews, p. 14, ints. 6 to 9.

The chart shows 14½ feet at low tide only 110 feet inside the school-ship, and 12½ feet at about 350 feet off. At time of collision, there would not be more than 25 feet at 350 feet inside her. Captain Matthews says, at 200 feet inside are only 13 feet at low water. The ship was evidently moored as near to the Bird-Island Flats as it was safe for a ship of 13 feet draft and 200 feet length and of her tonnage to be moored. (Matthews, p. 14, ints. 6–9.) The chart shows a long line parallel to the school-ship, and 440 feet inside, where there is but from 10½ to 11 feet water at low tide. At this time of tide, there would not have been more than two or three feet under the Java's keel at that distance, viz., 440 feet.

III. The danger of the place for such vessels is proved by the sparing use that the Cunard steamers have made of it, while it is much more convenient and cheap for them.

(*a.*) That it is more convenient, and saves time and money.

Martin, p. 208, ints. 6+ to 8+, show that it is an object to avoid the time, trouble and expense of tugs.

Fengar, p. 192, int. 9, shows the superior convenience of this passage, and the saving of a tug.

Hayden, p. 223, ints. 8+ to 13+.

Reed, p. 229, last sentence in answer to int. 12.

S. C. Martin, p. 239, int. 16.

Lovell, p. 257, int. 12: "Because that would reach my landing better."

Without evidence, it is plain that if the steamer can go over the school-ship's place in her absence, or, if she is there, can go close inside her, she will do her docking at less expense of time, labor and money.

(*b.*) With all these motives, how often have the Cunard boats been there? The school-ship has been there nine years.

E. G. Martin, the pilot, has been piloting the Cunarders for twenty-four years, and never took one inside before! (p. 208, ints. 1+, 2+.)

Capt. Moodie has taken *up* 100 Cunarders in 17 years, which would be about 60 since the school-ship has been there (p. 276–7, ints. 1+ 2+), yet he never took one or saw one taken up inside!

Matthews, (p. 15, ints. 10 to 13). He had been, before this collision, some three years in command of the school-ship, which lies at these moorings seven months of each year, and often anchors there during the other five (p. 14, int. 4); yet he never saw a Cunard steamer go inside before the Java (p. 15, ints. 10, 11).

Blaney, chief mate, had been in school-ship five years (p. 20, ints. 4, 6 to 9,; yet he never saw one go inside (p. 21, ints. 11, 12; p. 24, int. 25).

Jenkins, 2d officer, been on board the school-ship one year; never saw one (p. 28, int. 29).

Pennington, 3d officer, had been on board eight months, and never saw one (p. 34, ints. 20, 21).

M. B. Tower has probably had better opportunities and more occasion to observe the Cunard steamers than any man in Boston (p. 100, ints. 4, 6, 7, 8). Never saw one go inside before this collision, and only one since (p. 101, ints. 8, 9; p. 102, int. 13; p. 104, ints. 24, 25, 26; p. 105, ints. 5+ to 8+).

Kelley, p. 109, ints. 8, 9.

Reed, twenty years a Boston pilot. Never brought a Cunard steamer up inside the school-ship (p. 228, int. 9, 18+, 19). Never saw more than one go inside the school-ship (p. 233, 20+).

S. C. Martin, twenty-two years a Boston pilot. Took but one inside the school ship, — the Cuba (p. 237, int. 9; p. 243, 28+, 30+, 31+).

Judah Baker, p. 68, ints. 13–15.

Nickerson, p. 49, 50+, 51+.

At this state of tide, Capt. Moodie, with a large experience of Boston harbor, having taken up 100 Cunard steamers in 17 years, doubted if there was water enough to go inside, — undoubtedly he meant, safely. (Moodie, p. 154, 1+, 2+; E. G. Martin, p. 204, int. 20.)

The revenue cutter has been but once inside the school-ship. (E. C. Gardner, p. 184, ints. 2 and 3.)

C.

If such a vessel as the Java were compelled to go inside the school-ship, the only course giving a promise of safety would be to keep open the starboard side of the school-ship and her dock, from a long distance below.

I. Testimony to this point.

(1.) All the witnesses for the libellants testify in terms, or by necessary implication, to that effect.

Tower, p. 108, int. 29, is a fair specimen of the position taken by all our witnesses, and not denied by theirs (*infra*).

(2.) *The claimants' witnesses have indirectly admitted this.*

E. G. Martin, the pilot, p. 200, int. 10, says if he had not seen that there was nothing inside the school-ship, "I should not have gone there." Again, p. 201, "because it was a clear track inside;" and p. 213, 46+.

C. L. Gardiner is one of their strongest witnesses; yet he admits that all his opinions were given upon the supposition that the Java came up so on a line with the school-ship that she could always see a vessel as soon as it came past the school-ship's bow. He thought that necessary. On p. 171, int. 23, he states that all seemed clear, as justifying her course. (See also p. 176, 29+, 30+.)

E. C. Gardner, 183, int. 16, last sentence; p. 184, int. 7+, 8+; p. 186, ints. 19+ to 23+, and 24+ to 27+. In these answers he unequivocally states, that he should not consider it safe navigation to go inside except on such a line. The Java should not go inside unless she saw a clear passage. He adds force to his opinion, and shows his bias, by adding "and she didn't." Also, p. 187, ints. 28, 29, ints. 32, 33. It is clear, from his answer to int. 26, p. 186, that he thought a clear view on the starboard side essential to justify the Java; p. 188, 43+, he says he never would have taken the Java inside if he knew she was to meet a vessel.

Fengar, 192, int. 9, in justifying an inside course, thinks it necessary to say, "and there was nothing apparent on the inside course in her way."

Hayden, 223, ints. 14+ to 16+.

Maxwell Reed, p. 229, int. 12, being asked about going inside, makes it a *conditio sine qua non* that he shall see a clear course. He is careful to repeat this in several ways. Also, his answer to 28+, p. 234, shows the dangerous character of this passage for such a vessel.

J. T. Gardner, 247, int. 12: "I should be governed by the state of vessels that anchored on the north side, and unless I saw a clear course," &c.; also 248, int. 14.

Lovell, 257, int. 12: "If there were vessels inside, . . . I should not go there."

Low, p. 265, int. 12: "Should run up channel half-way;" then "if I saw no vessels, &c.;" int. 14, "provided there be no other vessels in the way besides the school-ship."

II. As has been said, smaller vessels go down inside, with the ebb; or vessels from Charles and Mystic Rivers, Charlestown, East Boston, and the North End of Boston. It is not enough to know, when a mile, or even half a mile, below, that there are no vessels at anchor inside near enough to make trouble. The steamer takes the risk that sailing vessels may come into that passage at any time; and she must have a clear view up the passage, so as to see such vessels at once, and have room and time to avoid them.

This is common sense, and not disputable. It is so stated by all the witnesses for the libellant, and indirectly admitted by many of the witnesses for the claimant (*infra*).

III. It was possible for the Java to have come up on the northerly side of the channel, from the Slate Ledge or above, so as to make a much straighter line than she did with the school-ship, and to have an earlier view than she had of vessels that might go inside the school-ship.

The contrary of this is not stated by any witness. The chart shows that she could have done so, and never had less than ten or eleven feet of water under her keel.

[That she did not do so, but approached the school-ship at an angle of 35° to 45°, — say 40°, — and saw the schooner across the

school-ship, has been proved; *ante*, A, I., II., III., IV., V., pp. 5, 6.]

D.

Positions of the respective witnesses.

As we are now approaching some conflict of evidence, it is well to suggest to the court some considerations as to the positions of the witnesses on the respective sides.

The Java is charged with fault, and consequent liability. Her pilot, Martin, is testifying for his reputation, and perhaps his employment hereafter, acting under the strongest bias. After having for twenty-five years piloted the Cunard steamers, he attempts, for the first time, to take one inside the school-ship, and that a screw of the largest size and draft, and gets into trouble.

The commander, officers, and petty officers of the Java are naturally biased for their ship. There is a further consideration, which the court should remember. The company called, for convenience, "The Cunard," is one of the largest employers of seamen and officers in the world. Men enter her service expecting to remain in it, and looking for promotion. It is hardly to be expected that an officer of such a company would testify against her, if he could escape, or that he would do else than render his testimony as favorable as possible; and this, in matters of opinion or estimation, is often done by men who would not misstate a fact clearly in their memory. The evidence in this case from these witnesses is almost entirely to matters of opinion, judgment, and estimation.

The next class of witnesses is the pilots. There are two notoriously strong influences to which pilots are liable. It is almost impossible to get a pilot to testify against another pilot of the same port, whose conduct or skill is under adjudication. Mutual interest and feeling and *esprit du corps* are powerful. The second influence is one which prevents their testifying against a large company, which

employs a great many vessels going in and out of their port; for the company has an absolute right of selection of pilots for the passage out. If a pilot should testify against his brother pilot, and that one of the oldest and most popular, and against a Cunard steamer, might he not naturally fear that, in the great competition, he might not be again employed?

Now, there are in Boston about forty branch pilots. Any of these would be glad of a chance to testify for a Cunard steamer. The claimants had every opportunity to canvass them; yet what is the result? They call E. G. Martin himself; his brother, as a selected expert, not as a witness (for S. C. Martin's bias, see p. 244, ints. 36+, 38+, 40+); next Hayden, who belongs to the same boat with Martin, and has heard Martin's story often (Hayden, p. 225, ints. 33+ to 40+). The next is Reed, who is in the same boat with S. C. Martin, and has heard E. G. Martin's story often (Reed, p. 235, ints. 36+ to 39+, and 44+).

There are only two other pilots called, — Low and Lovell. Lovell is a coast pilot, and not a Boston pilot, and is a personal friend of E. G. Martin, and has heard the story from him, and made up his mind on that story, and, before hearing any evidence (Lovell, p. 260, ints. 9+ to 16+). Lovell says he has heard forty pilots talk it over, and names five besides the two Martins (Lovell, p. 262, 2+). Of these five, the claimants call *one*, — Reed.

Of the five branch pilots they call, three have taken one Cunarder up inside the school-ship. These are, doubtless, on the evidence, *the only pilots that have taken one inside.* They of course justify their own act.

A shipmaster of the character of Capt. Charles L. Gardiner, a passenger in a Cunard boat, is likely to become intimate with the master and officers, and to go with his ship, as far as he can, against a petty coaster. So with Coffin, who was the regular pilot of the Java. As to the officers of the revenue cutter, it is well known that the most intimate relations exist between them and the officers of the Cunard steamers, — more intimate than is well for the public service; certainly enough to give them a desire to say a favorable word for their friends, if they can. They consider themselves as

gentlemen alike, wearing uniforms, and think little of the rights of these petty, embarrassing coasters. Any one who has heard them talk familiarly, knows the disregard many of them feel for the rights of such craft.

Of all the persons in Boston who saw that occurrence, the claimants call but two who were not on board the Java; and those are the captain and chief officer of the cutter.

This enumeration disposes, we believe, of all their witnesses. Now, as to the libellants' witnesses. The James McCloskey is not charged, or sought to be held responsible; and all admit that it was right and natural for her to go down inside, from an East-Boston wharf, and that starboarding her helm was all that she could do. Besides, the vessel has no interest in this suit, but only the owners of the cargo. Leaving out the master and mate of the schooner, — witnesses of necessity, — we believe there is not a witness on our side liable to any bias or influence in our favor. We offer those who know best the very *locus in quo*, and had the best opportunity to see, and were under no bias or influence, — four officers from the school-ship, two gentlemen, entire strangers, Capt. and Mr. Nichols, who saw the occurrence from a good point in East Boston, and another who saw it from Boston; then Mr. Tower, whose interest is not with us, and who is an incomparable expert as to Cunard steamers and the *locus in quo*.

E.

Change in the course of the Java.

I. When and where made?

It is for the interest of the Java to prove that the change was made as low down the harbor as possible, in order to make the angle with the school-ship less. No one puts it lower than abreast the

Slate-Ledge buoy. This is only 2700 feet from the school-ship, or less than eight times the Java's length. Yet this is lower than she was, in fact.

Slaiding, though quartermaster at the wheel, gives no account of the time and place; p. 144, ints. 12+, 13+, and 15+ to 22+.

Moodie says only "*about* abreast" the Slate Ledge, when they decided the question; p. 150, int. 7; p. 154, ints. 1+ to 11+.

Coffin, p. 161, int. 7; "A little above Slate-Ledge buoy, when pilot thought it advisable," &c. Then came the order "Port!" then "Steady!" &c. Also p. 165, 6+.

E. C. Gardner, p. 188, ints. 40+, 41+, puts the time of the change as after she passed the Slate Ledge, and before she met the unknown schooner.

Nickerson, p. 39, ints. 10, 11, 16.

Baker, p. 67, int. 8.

It is, by the chart, requisite that the change should have been made above the Slate Ledge, to bring the Java on the angle her own evidence shows her to have been. But we have always believed that she did not make a straight course from her first turn to the stern of the school-ship, but turned a little to port, and then, as she drew near, a little more. (Slaiding, the man at the wheel, p. 145, int. 15×, "not straight." E. C. Gardner, p. 181, int. 7, "She straightened her course," &c.)

II. Why was the course changed?

It is too clear for argument that it was solely for convenience. The Java had before her the channel. The pilot, *for the first time in his life, determined to go inside.* It was more convenient as to docking to go inside, and would save time, and perhaps money. He had no other reason.

It was not done to avoid vessels at anchor on the other side of the school-ship. We wish the court to notice how persistently and ingeniously questions have been put to the most ready witnesses, calculated to draw out answers tending towards a statement that

vessels lay at anchor to the westward and northward of the school-ship, so as to make that passage dangerous, and how they failed.

Coffin, 161, int. 7, says only, "Pilot thought it *more advisable*, as the school-ship lay in our course to the dock, and there were vessels to westward;" p. 165, int. 4×, 5×; "Chances for getting to dock would be better."

E. G. Martin, 204, int. 20.

The choice was between the channel, 3000 feet wide, in which were a few vessels, and a passage he never took such a ship through, in which he *then* saw no vessels. Any moment might bring one in. The convenience of this experiment is detailed in E. G. Martin's answer to int. 21, p. 204, and on p. 205, end of answer to int. 29, and ints. 4+ to 8+, p. 208.

Hayden, p. 226, ints. 28, 29. Observe the difficulty in getting a favorable answer to int. 30.

Reed, 229; last sentence in answer to int. 12.

S. C. Martin, 239, int. 16.

Lovell, 256, int. 12.

We pray the court to note particularly the skilful questions put to the experts, to obtain answers to the effect that the course taken by the Java was the right, and the channel would have been the wrong course, and how they failed of their results. The question supposes a case (1) of an entirely clear passage inside the school-ship; (2) a large number of vessels at anchor outside the school-ship, and between her and the dock; and then puts the question in the mild form, "Which would be the *proper* course?" or, "Would it be *the proper course* to go outside?" The word "proper" is skilfully chosen; for the affirmative means little, and the negative can be treated as if the expert had said "improper," which is equivalent to unjustifiable. Yet it failed.

Reed, 229, int. 13. The above extreme case is supposed, and the inquiry put, "What would be *your proper course* to your dock?' Ans. "Inside the school-ship." P. 230, int. 16, again puts the extreme case, and asks, "Would you or not consider it *proper* to go outside the school-ship?" Ans. "No, sir; I should not think it proper." Now, from these answers, it might be argued that Reed,

a pilot of twenty years' standing, thought it "improper," *i.e.*, "wrong," to go outside. But p. 234, 27+, shows that all he means is, that, in the extreme case supposed, it would be "less convenient."

Hayden, 220, int. 16; the same state of things assumed, and asked if "proper" to go outside. Ans. "Should go inside, under the circumstances;" "Not consider it *proper* to go outside." But, being cross-examined, p. 223, ints. 12+ to 16+, he says distinctly it would not be "imprudent" to go outside, and that all he meant was that it would be "inconvenient."

S. C. Martin, 238, int. 12, the same case put; but he answers, "*If I were* going inside." Int. 13 presses him close on the word "proper;" but he only answers, "I should go inside," &c. Int. 16, p. 239, drives him to the affirmative or negative of "proper;" but he answers, "It would not be so well to make the dock—the landing at the dock—to go outside." Even his brotherly love would not bring him up to the word "proper;" and, on the question being directly put to him (p. 244, 34+), he frankly admits, that, even in this supposed case, there would be no objection to going outside, *but less convenience in getting to the dock.*

Low, 265, int. 16. The counsel supposed, as usual, a clear course inside, and an obstructed course outside, and puts the question, "Would you, or not, consider it proper to go outside?"

Ans. "No, I should not; *it would be more work to get her to the dock.*"

This style of interrogating the experts, with their answers, is fatal to the claimants, on the expert testimony. They assume a clear course inside, which can never be assumed in fact. They then assume an obstructed course outside, leaving the number of vessels, and their position, to the choice or imagination of the friendly expert. Then they do not venture beyond the word "proper;" and when their witnesses adopt that, they almost, if not quite, without exception, explain it as referring to convenience in docking.

But if the claimants had secured the most favorable answers from these witnesses as to the impropriety of going outside, and the propriety of going inside, there would remain the fact that *none of them had ever acted on such a theory.* Hayden, of sixteen years' stand-

ing, has taken one Cunard boat inside. Reed, of twenty years' standing, has never taken one inside. S. C. Martin, of twenty-two years' standing, has seen but one of the large class Cunarders go inside, and that was the Cuba, which he piloted there. (237, int. 9, and 243, 28+.) John T. Gardner, pilot sixteen years, says, p. 246, int. 3, "I have had charge of a number of them [Cunarders], as pilot; probably *had a large share of them.*" Yet he never took one inside, nor saw one go inside. Low, of seventeen years' standing, says, p. 263, int. 3, "I have had charge of almost all their [Cunard Company's] ships, as pilot." Yet he never took one inside. And E. G. Martin, a pilot for thirty-four years, never took one inside until this time.

The court may be sure that the claimants have produced every pilot that ever took a Cunarder inside the school-ship. She has been at her moorings seven months of every year for some ten years; and the Cunarders came to Boston regularly to the time of the collision, both passenger and freight boats, the passenger boats at the rate of fifty-two a year.

Let it be especially considered, that the two or three cases stated of a Cunard steamer coming inside the school-ship are of no value *unless the course they took is explained.* If they kept to the north-east side of the channel, from the Slate Ledge up, and were able to keep the course open, it was not so hazardous. Besides, did they meet vessels? Did they stop for them in season? What was the history of each case? Was their experience the reason that *no one pilot ever tried it twice?*

It is observable that the claimants have called several persons to show that steamers, sometimes of large size, go inside the school-ship; yet their counsel did not inquire of one of them what course they took in coming up; whether they did or did not keep on the northerly side of the channel, and keep the passage open to view, or how the school-ship tailed at the time; although he was put on that inquiry, and shown its necessity by Tower's evidence, p. 108, int. 29.

F.

Difficulty in managing such a ship as the Java in that place.

I. The claimants' witnesses say that it was impossible to let go an anchor when the Java saw the J. McCloskey. It would either make a hole in the Java, or wrench her badly forward, and would not stop her in season to prevent a collision, and would probably cause her to swing into and badly damage the school-ship.

C. L. Gardiner, 175, ints. 26, 27.

Fengar, 197, 26+ to 29+.

E. G. Martin, 200, int. 8, saw his anchors ready; but could not use them, p. 207, int. 34 to 36; pp. 213, 214, ints. 47+ to 52+.

Hayden, 221, ints. 23 to 25; p. 224, 25+ to 27+.

J. T. Gardner, 253, ints. 11+ to 13+.

Lovell, 260, 8+; p. 258, int. 21.

Slaiding, the man at the wheel, p. 146, int. 31+ to 36×; p. 147, 37+ to 40+.

Browne, 271, int. 21–24; p. 272, 1+.

Low, 266, ints. 21, 22.

Moodie, 276, ints. 23, 24, 25; p. 278, cross ints. 19–22, p. 279, 25, 26, 30–39.

Capt. Moodie says, that as soon as he saw the J. McCloskey, he considered the question of letting go his anchor, and felt it to be dangerous and useless, p. 276, ints. 23–25.

II. The question whether the Java ought to go into a passage in such a manner that she cannot, to save a collision, let go her anchor, is reluctantly answered by Reed, p. 234, int. 28. "I shouldn't consider it prudent to take her to such a place where it would be unsafe to anchor."

III. The Java is 360 feet long, and a screw. It is admitted by the witnesses on both sides that a screw is more difficult to manage than a side-wheel in channels and narrow passages, and where there is little water.

Tower, p. 104, 27, 28. J. T. Gardner, p. 254, 16+ and 17+.

So, the evidence of the uncertain effect of the wheel on a screw when engines are reversed.

IV. Difficulty of manœuvring the Java.

Blaney, p. 22, int. 20.
Tower, p. 101, ints. 11, 12, 14, 16; p. 108, 31+.
Fengar, p. 191, int. 5. "I saw it was inevitable."
Capt. Moodie, p. 159, 50+.
J. T. Gardner, p. 253, ints. 13+ to 27+.

G.

The Java could not go to the eastward, or ahead of the J. McCloskey; and her only chance was to go between her and the school-ship.

I. The fact that the Java at once starboarded her helm shows that this was the opinion of the pilot and captain. And no witness has suggested that she should have ported her helm, although that is the general rule of the sea; but all say that starboarding was right.

C. L. Gardiner, 170, int. 19.
Browne, 129, int. 13; p. 131, int. 26.
Slaiding, 142, ints. 12, 14, 17.
Moodie, 151, int. 16; 153, int. 37; 159, ints. 51+, 52+. — A clear admission that she could not have gone to eastward of the J. McCloskey.
Coffin, 162, ints. 16, 17; p. 167, 27+, 30+.
E. C. Gardner, 185, 11+.
Fengar, 193, int. 15; 196, 18+.

E. G. Martin, 202, int. 11.
Hayden, 221, ints. 19, 20.
Reed, 230, ints. 18, 19.
S. C. Martin, 240, int. 19.
J. T. Gardner, 249, ints. 19, 20.
Lovell, 258, ints. 19, 20.
Low, 266, ints. 19, 20.

II. The fact that the J. McCloskey starboarded her helm shows that such was the opinion of her master; and every witness has said that she did right. Yet she was reversing the general rule of the sea; and Browne, the first officer of the Java, ordered the McCloskey to starboard her helm.

Browne, first officer, 134, 135, ints. 27+ to 31+.
Coffin, 164, int. 31+.
Jenkins, 29, int. 36.
E. Crowell, 79, 27+, 31+.
Capt. Moodie, 157, 30+, 31+, 33+.
C. L. Gardiner, 170, int. 19.

All the testimony *ante* showing that the Java could not go to the starboard of the J. McCloskey, and that her only chance was to try to to go between the J. McC. and the school-ship, also shows that starboarding was the only course for the J. McCloskey.

The fact that the J. McC. was moving eastward, and that, although both vessels starboarded their helms, the Java struck the J. McCloskey just abaft her main chains, makes it clear that it was impossible for the Java to go across the bows of the J. McC., even if there had been water enough.

III. We therefore show the Java in a position where she could not anchor with safety or advantage (as she admits), and where she could not go to the eastward of the J. McC., and where the J. McC. is admitted by all to have done right in keeping on and starboarding, and where, with all the Java's efforts to go to port, she could not clear the J. McC., and where, with all her efforts to stop and reverse,

she could not do else than cut the schooner down, so that she sank almost at once. We show her going, for her convenience merely, into a place where she had but one chance to escape destroying a vessel, and that by going between her and the school-ship; and it turning out she could not do that, although she did her best, and the J. McC. co-operated.

H.

The Java had no chance to go between the J. McCloskey and the school-ship.

I. The result proves it.

II. To go parallel with the school-ship, she would have been obliged to make a turn of from 35 to 45 degrees in that small space, going ahead all the time. Even if she could have cleared both the school-ship and the J. McC., by coming round to within 15° of the school-ship's line, she had not time or space.

Jenkins, 28, int. 33.

Pennington, 34, int. 16; p. 36, 13+.

W. P. Nichols, p. 60, ints. 16; p. 61, ints. 21, 22, 23; p. 62, int. 33.

Browne, 135, 28+. Mr. Browne admits that he ordered the J. McC. to starboard her helm; and yet thought there was no use in the Java putting her helm to starboard, as it would endanger her running into the school-ship (p. 135, cross-ints. 32, 33; p. 136, 43+, 46+). The claimants' ints. 31, 32, p. 136, 7, and Mr. Browne's answers, show he could not say it was even *possible* for her to go between the school-ship and the J. McC.

C. L. Gardiner, 172, int. 3; p. 174, ints. 17+ to 20+.

E. C. Gardner, 185, 12+.

Fengar, 197, 23+, 24+.

Hayden, 220, int. 19.

Capt. Moodie. The court is requested to read his answers from cross-int. 36, p. 157, to cross-int. 52, p. 159, that the court may see how he attempts to make it appear that he could have gone to the westward of the J. McC., if she had been still, and how he fails, and is driven to admit that he could not have done so.

III. Result. According to her own showing, the Java went into a place where, from simply meeting one small vessel in a usual and not unexpected place, she could do nothing to prevent a collision, either by her machinery, her ground tackle, or her helm, or by all combined.

Capt. Moodie says, p. 157, 33+, that if the McC. did not see the Java until the Java saw her, the collision was unavoidable.

See also E. C. Gardner, p. 187, 32+, 33+, and Fengar, 190, int. 5.

In this, we assume her story to be true. It is not so clear that she could not have anchored.

I.

Could the Java have anchored, with benefit and safety?

I. Opinions.

Capt. Gardiner, p. 179, in answer to cross-int. 49, distinctly admits that if the Java had reversed her engines and dropped her anchor as soon as she saw the J. McC. the collision would not have occurred.

Matthews, p. 17, int. 20, 21.

Nickerson, p. 41, ints. 27, 28.
Tower, 103, ints. 17, 18; 106, 10+.
Hayden, 221, int. 23, and 224, 26+.
Capt. Nichols, 62, ints. 27–29.

Capt. Moodie, p. 278, takes the ground that it was not safe to anchor the Java until she came to a dead stand.

Mr. Browne, does not go so far, but thinks that at one or two knots there would be danger (270, int. 17).

II. The Java's witnesses say she was going at a very slow rate when she saw the J. McC. This was said in order to show prudence in her management; but, if believed, it tends to show that she could have checked herself by an anchor.

Slaiding, 147, 35+.
Moodie, 153, int. 32.

Coffin, 163, int. 19: 1½ or 2 knots *through the water*. As there was an ebb tide of from 1 to 1½ knots, this would be less than one knot *over the ground*, which is the only fact affecting her anchoring. The stronger the ebb tide took her, the better for anchoring.

C. L. Gardiner, 170, int. 15, thinks the Java was at a *dead stop a few seconds before she struck*.

Herriot, the chief engineer, 139, ints. 14, 15, says the Java's engines are the best for quick reversing and stopping. At p. 140, int. 21, he says that at the rate she was going when he stopped her for the first schooner, it would require 20 back revolutions to bring her to a dead stop. Twenty revolutions are made in about 26 seconds (p. 139, int. 16). Now, if 20 back revolutions would bring her to a dead stop when the engines were stopped for the strange schooner, her rate of way was less when they discovered the J. McC.; for after the engines were stopped, her way steadily decreased. Slaiding, p. 142, int. 11, puts the time the engines were stopped until reversed, at two or three minutes. Capt. Moodie, p. 151, int. 13, "several minutes." Therefore, she was going "slow," which is, three to four knots (Herriot, 139, int. 19), and stopped her engines for the strange schooner, when 20 back revolutions, of 26 seconds,

would have brought her to a stand, and remained with engines stopped for two or three minutes, or "several minutes," and then backed at full speed. Certainly, ten or fifteen back revolutions ought to have brought her to a stop, then. Capt. Moodie says she was only going 1 or 1½ knots when the order was given to reverse. p. 15, int. 19.

It seems as if there could be no danger of parting a chain under such circumstances, with a head tide! But it matters little to the libellants whether the fault of the Java was in not letting go her anchor, or in going where she could not use it.

III. In reply to the evidence of the claimants, that it was not safe to bring the Java to anchor before she came to a dead stand, the libellants offer evidence to prove that she has, before this, been brought to anchor under good way without injury or difficulty.

See evidence of Mr. Lunt, the pilot, p. 114; Mr. Bird, the master of the yacht Ambrotype, p. 117, and the evidence of Mr. Browne, p. 268–9, and Capt. Moodie, p. 274, taken to rebut the foregoing. From this evidence it appears that Mr. Lunt, in the evening of July 2, 1867, brought up the Java, with a flood tide of about two and a half knots, the Java going enough faster than the tide to have steerage way. The China was in the dock, and it was necessary to bring the Java to anchor for the night. Mr. Lunt had got about as high as the ferry, when he ordered the engine stopped. Then he saw the Ambrotype right ahead, baffled by a light wind, and unable to get out of the way; so he let go his anchor at once, sooner than he had intended, and brought her to at about half her length, without injury, she going at the time about two and a half or three knots. Having brought her to anchor there, she remained there until she went into dock the next day. The evidence of Moodie and Browne only shows that they either did not know, or, more likely, did not remember, the fact that the Java, three years before, while preparing to come to anchor, did in fact drop her anchor while under way, to avoid a yacht. As the place where she anchored was not unfit or unusual, it was natural that they did not know or notice or remember the fact about the yacht. On the other hand, if this is not true,

there is perjury in two witnesses who swear affirmatively, and have no interest.

Having shown (*ante*) at what angle the Java was going to the school-ship, we now inquire,—

K.

How near to the school-ship's stern did the Java go?

Jenkins, p. 30, cross ints. 14–16. "About 100 ft."

W. P. Nichols, p. 63, +5. 100 ft. or 200; not *know*, &c.

Slaiding, 143. 2+, says the Java was only 200 ft. from school-ship when he saw the strange schooner. She must have been much nearer to her when he saw the James McCloskey.

Capt. Moodie, 155, 14+, pp. 279, 280, cross ints. 26 and 38, puts it at 100 feet.

Coffin, 162, int. 13, puts it at one half the Java's length, say 180 feet.

C. L. Gardiner, 169, int. 12, says she steered so as to go within 100 feet of the school-ship. 172, 3+, last sentence.

Fengar, 196, 21+, puts the McCloskey at only 150 feet from the school-ship when the Java struck her. The Java must, before that, have been as near as 100 feet.

Thus we have the Java steering towards the school-ship at an angle of from 35 to 45 degrees, seeing the masts of the McCloskey over and across her, and steering so as to come, and actually coming, within 100 feet of the school-ship's stern. This made it impossible to take the course necessary to bring her near the starboard side of the school-ship, without making a very sharp turn, sharper than she could effect in season to clear the McCloskey And no witness intimates that the McCloskey came nearer to the school-ship than she ought. This was gross carelessness, or, more correctly, an inexcusable experiment on other vessels' safety.

The Maria Martin, U.S. Circuit Court for Wisconsin, Davis, J. "To put only 100 feet between her [a propeller] and the tug, when she could, with safety to herself, put a greater distance between them, considering the circumstances of the navigation, was bad seamanship."

The Clement, 2 Curtis C.C. Rep. at. p. 68.

L.

Further proof of the course taken and of the risk assumed by the Java, drawn from the evidence as to the strange schooner.

I. The strange schooner came out from behind the school-ship, probably from an East-Boston wharf, and was not seen by the Java until she was clear of the school-ship's stern. She was but a few yards ahead of the McCloskey; and, if the Java had been two minutes earlier, she would have met two vessels instead of one, in that passage. The Java had hardly got rid of the strange schooner and had time to turn her attention elsewhere, before she saw the McCloskey.

Slaiding, being at the wheel in charge, is as good a judge of the intervals between the acts of the Java as any one (141, ints. 5–7.) He is precise in his statements of intervals, throughout. At p. 142, int. 11, he allows two minutes or three between stopping the engine for the strange schooner and backing her for the McCloskey. At p. 143, 2+, he says the Java was 200 feet from the school-ship when she saw the strange schooner.

As the evidence is that the Java passed within 100 feet of the school-ship, and was going, after she stopped her engines, at the rate of one or one and a half knots, there must have been but very

little space and time between the two schooners. Slaiding, p. 146, 23+, puts the time between the passing of the first schooner and the seeing of the McCloskey at two minutes. At 24+, p. 146, he says he did not see the strange schooner until she had come out clear of the school-ship. At p. 146, 28+ he says the time between the engine's beginning to *stop* and beginning to *reverse* was "not many seconds." On re-examination, p. 148, the counsel for the claimants endeavored to change this evidence; but Slaiding would not change, but rather made it worse for the Java. See int. 27, where he leaves the time between one and two minutes. Int. 28 asks him to reconsider his answer to cross int. 28, p. 146 (*ante*). He does so; but he says "after she was stopped, of course she ran slow a *very, very short time* before she changed to back." Int. 29 fares no better; for he still puts the interval at *one or two* minutes. Int. 30 makes a third and last attempt, with no success.

Coffin, p. 162, int. 12, says the Java's engines stopped, before they reversed, "probably a minute and a half, or two minutes." In answer to int. 13, he says the McCloskey was first seen on board the Java "about the time the schooner under sail had got out of our way."

C. L. Gardiner, 169, int. 8, does not put the Java's distance from the schhol-ship, when she stopped her engines, over 350 feet, fairly considered.

How absurd are the efforts of Martin, the pilot, to justify himself by saying that he went inside because he saw his course clear on that side; and that he would not have gone there unless it was so (201, int. 10); when in point of fact, he met *two* schooners coming through the passage, to avoid the first of which he was obliged to bring his engines to an entire stop, and the other of which he could not avoid!

M.

Actual negligence in the pilot after he saw the McCloskey.

I. E. G. Martin admits that he did not reverse as soon as he saw the McC.; but (201, int. 10) not until her "jibboom *and bows*" came out clear of the school-ship's bow. As most of the witnesses say they saw the masts of the McC. across the school-ship, before any part of the McC. was open, this was negligence in the pilot, in such a place as he was in.

What would have happened, if there had also been a tug or scow, or boat, in that passage, without masts to be seen over the school-ship?

II. E. G. Martin knew there was a tug, the Clover, at his disposal, close by, when he went in, and could have had her help, if it had been necessary, in going through that passage. 209, 13+, 14+, and 211, int. 32.

The Peerless, Vern. Lushington, 31.

N.

We will now consider the action of the J. McCloskey.

A fore-and-aft schooner, of about 121 feet length, and 8 feet draft, deeply loaded, attempted to start from her wharf in East Boston; but the wind blew her against the wharf before she could get headway. She then took the tug Clover, which towed her far enough to get her clear of the wharves, and under good way. Also, she could not have gone outside without making a long circuit, which she could not do against the tide.

I. The McCloskey not only had a right to go close inside the school-ship, but that was her most natural course. The chart shows this, as well as the evidence.

II. She was a good vessel, and obeyed her helm readily.

Nickerson, 39, ints. 7, 8.
Kelly, 110, int. 10.

III. She was under headway, had sail enough up for steerage, besides the impetus from the tug; had steerage way on, and actually obeyed her helm.

Jenkins, 26, int. 9; p. 27, int. 19.
Pennington, 32, int. 6; p. 34, int. 14; p. 35, 3+, 4+.
R. C. Nichols, 51, int. 6; p. 53, int. 21.
Capt. Nichols, 62, ints. 31, 32; p. 63, 6+.
E. Crowell, 76, int. 7; p. 78, ints. 20, 21; p. 79, ints. 29, 30; p. 87, ints. 46, 47.
P. T. Crowell, p. 92, ints. 48–52.
Kelly, 110, int. 11.

The persons on board the Java had no chance to see whether the J. McC. had steerage way on her. It is all guess with them. So she was hidden from Fengar and E. C. Gardner, *the only other persons called by the claimants, who saw the transaction.*

It may also be suggested, that the officers of the Java were giving their attention to the strange schooner, or might have seen the J. McCloskey sooner.

IV. It is admitted by all that the J. McCloskey did right in starboarding her helm. She was ordered to do so from the Java (*ante*).

V. The only fault found with the McC. is, that her sail was not fully up. We have shown (*ante*, III.) our positive proof that she was under steerage way. Also, all admit that her foresail was the

right sail to set first, in that direction of the wind, and that it was partly up. The only question is, *how far* was it up. See *ante*, III.

The McC. did all that can be required of such a vessel. She came from the wharf with her sails down, because they forced her against the wharf. She began hoisting the foresail, and had got it two-thirds up, when she saw the Java. The distance from her wharf to the school-ship was not great, and she came down rapidly with the tug and the tide. No small vessels in a breeze that forces them to the wharf with one sail up, having lowered that sail and taken a small pull from a tug, would get more sail up in that time. No person that had ever sailed in such vessels is called by the claimants, and *no evidence produced to show that the McC. was at all negligent in getting as far as she did, with no more sail up than that.*

VI. The McC. did not, in fact, know that a Cunarder, or any large steamer, was coming up the harbor. Yet she could see far down, on a line inside the school-ship.

E. Crowell, 78, ints. 16–19, 23; p. 79, ints. 31, 34.
P. T. Crowell, 89, ints. 17–26.

VII. If she had known that a Cunarder was below, she was not to anticipate that the Cunarder would come up inside.

Hayden (claimants' expert), 223, cross-ints. 10, 11.

The fact that so few Cunarders (two or three out of several hundred passages) have gone that side, as to leave most persons in the belief that they never went up there at all, shows that the McC. was not to expect them there.

All the witnesses for the libellants say that a small vessel, going in this passage, would not expect to meet a large steamer crossing the school-ship's stern.

VIII. But, if a large steamer was to come up inside, the McC. had a right to expect that she would come up on such a line with the school-ship as to show herself in due season. This is the great error of the Java. *The McCloskey was not bound to anticipate that*

such a vessel as the Java would come into the passage, round the school-ship's stern, at such an angle as she came in, taking the most favorable view of the testimony for the Java.

IX. As the McCloskey was taking her right and usual course inside, and doing, with her sails and helm, as such vessels usually do in such states of tide and weather, and the Java came into a narrow passage for her own convenience, when she had the whole channel to go up, leaving the usual for the most unusual course for vessels of her size, and could do nothing to avoid the collision, she cannot escape liability by simply showing that the schooner's sail was not fully up, and arguing that, had it been, she might have seen her earlier.

The Isaac Newton (*Crockett* v. *Newton*), 18 Howard, 581.

[Judge Lowell, in his opinion cited by the appellant, distinguishes that case from the present, by saying that that schooner had her sail fully up, and the steamer was in fault in not seeing her. But, while the court does so say, it also and independently of that puts the steamer in fault for going into the passage between large vessels, for her own convenience, "without first ascertaining that the track was clear." See the last two sentences, p. 584: "The steamer, therefore," &c.]

X. *But the sail not being fully up did not prevent the Java seeing her in the clear day, and over the school-ship.*

Coffin, 162, int. 15: "*When we first saw her*, we saw no sail;" p. 163, int. 22: "*I could see her masts.*"

Browne did not see her until she came out; but says that the pilot and master saw her before. 129, int. 13.

Martin, 201, int. 10; 209, 17+; 210, 18+ to 23+; 202, int. 12.

O.

The exact place of the collision.

The answer, p. 10, near foot, puts the James McCloskey "a short distance off the beam" of the school-ship when first seen, and "directly in the Java's course."

Jenkins, 28, ints. 30, 31, 33; p. 32, 28×.

Pennington, 33, int. 13; 35, 5+.

Capt. Nichols, 64, 9+.

Coffin, 162, ints. 13, 14.

C. L. Gardiner, 169, int. 13.

Fengar, 195, 12+; 198, 32+; 100 feet off her starboard bow.

E. G. Martin, 211, 28+, 29+.

Moodie, 279, 26+, and 280, 38+.

E. Crowell, 78, int. 16, 22, 25; 79, int. 31, 32; 84, 27+, 32+.

P. T. Crowell, 89, int. 19.

The fair result of the evidence on both sides is, that the collision occurred off the starboard quarter of the school-ship, at about 100 or 150 feet away. We mean, of course, the point of contact; for the Java was so long as to cover a quadrant of a circle, as seen from the stern or quarter of the school-ship, at so short a distance off.

P.

Vessels at anchor west of the J. McCloskey.

It seems that at the trial in the district court, the master and mate of the McCloskey said nothing about any craft at anchor there. The reason they give is that they were not asked. (E. Crowell, p. 86,

46+.) This is not unnatural in men of so little knowledge of what is important in a collision, and so diffident in court. The depositions of all our witnesses who saw the occurrence were taken before that of Capt. Crowell, so they were not inquired of on that point. Capt. Crowell first stated it in his deposition, p. 79, int. 35; p. 86, 43+, 44+. P. T. Crowell confirms him, p. 92, int. 54, 55, 56. See also p. 96, 41+. As the vessels' being there was of little consequence, since it is put beyond doubt that the Java could not have gone to the eastward of the McCloskey, between her and the flats, it was not thought necessary by us to retake our depositions for that fact, nor did the claimants retake theirs, or put the question to Moodie or Browne when their second depositions were taken.

Nickerson, p. 41, int. 25–27, confirms this evidence as to vessels at anchor in the steamer's way, *on the inside*, although his deposition was taken seven months before Crowell's. That the counsel for the claimants so understood his testimony, is plain from his cross-ints. 11, *et seq.*, p. 45. See also p. 50, cross-ints. 47–50.

Still, under the circumstances, we do not ask the court to treat this as affirmatively proved, there being so little chance for full examination or explanation on either side.

Q.

Rules of law.

I. Statute regulations: Act. 1864, ch. 69, art. 15 (13 Stat. 60). "If two ships, one of which is a sailing-ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship."

II. *If a steamer approaches a sailing-vessel, the steamer is required to take the necessary measures to avoid collision; and if collision*

occurs, and it is not shown to have been inevitable, the steamer is, prima facie, in fault.

The Oregon, 18 How. 570. In this case, between a schooner and a steamer, the court was unable to decide which vessel had committed the fault of going to starboard of the other in an open bay, with plenty of room, and a clear night. The steamer was held, on the doctrine that she is *prima facie* liable for a collision if it is clearly a case of fault in one or the other.

The Pacific (*N. Y. & L. S.S. Co.* vs. *Rumball*), 21 How. 392, Clifford, J. A brig run down by the steamer Pacific, time and light enough. The proof not clear. P. 379: "All the circumstances tend to show that the disaster might have been prevented, and that there was fault somewhere, for which the offending party ought to be held responsible." P. 385: "It is not denied that the collision took place, and that the brig was run down and lost; and such being the fact, and the evidence exhibited failing to satisfy the court that the brig was in fault, or the disaster inevitable, it necessarily follows that the collision was the result of fault on the part of the steamer, and that the steamer is answerable to the libellants for the damages."

The City of New York, 1 Clifford's R. 84. "Vessels propelled by steam have command of their own course and their own speed; and it is their duty, when there is room, to pass an approaching sailing vessel *at such a distance as to avoid all danger*."

The Governor, 1 Clifford's R., 93, Clifford J., p. 97. "Precautions must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity for precautionary measures was not perceived until it was too late to render them availing. Inability to avoid a collision usually exists at the time it occurs; but it is generally an easy matter to trace the cause of the disaster to some antecedent omission of duty on the part of one or the other, or both, of the colliding vessels."

The Carroll, 8 Wallace, 302. — Schooner and steamer. Time and light enough, and both sides agree that the collision ought to have been avoided, and was produced by fault; and the only question was, which was in fault? Davis, J.: The fact that they did collide

shows that there was danger; and, as it was not inevitable, "steamer cannot escape condemnation, unless she is able to show . . . that she adopted suitable measures to avoid it." A schooner must keep her course, and steamer can choose her mode of avoiding; then, if there is time enough, steamer is to blame for suffering the peril to occur." The schooner had starboarded her helm, as she said, at the last moment, to diminish the force of the collision. The steamer's evidence was that the schooner changed her course earlier. The court inclined to believe the schooner; but adds, "If it be conceded that the schooner was wrong in starboarding her helm, this cannot affect her right to recover, as she was in other respects without fault; because the steamer, having the right of way, put her in this predicament, and must answer for the consequences." P. 306, "If there was fault on the part of the schooner, the steamer committed a far greater fault *in suffering the vessels to get in such a dangerous proximity* at the moment preceding the collision; and, as she has furnished no excuse for this misconduct, is chargeable with the damage."

The Clement, 2 Curtis C. C. Rep. 369. "It is further insisted that at the time in question, the brig was so near the Graves that she could not luff sufficiently to clear the Hornet and keep clear of the Graves, nor bear away without running the Hornet down. This may be true; but those in command of the brig should have foreseen these difficulties before the brig was in a position where she could not keep out of the way of the schooner."

III. Inevitable accident is not simply when it is too late, but it must appear that its being too late was not the fault of either side.

It must be understood to mean "a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent its occurence." Adopted by the Supreme Court in

The Pennsylvania (*The Union S. S. Co.* v. *Va. S.S. Co.*), 24 How. 313.

It does not apply to a case when it is simply too late; for the question remains, how came it to be too late? (Cases there cited.)

See, also, dissenting opinion in the *Grace Girdler*, 7 Wall. 204, showing unwillingness to admit a collision to be accidental or inevitable, when it occurs in the day, good weather, and with time enough, and one vessel has on her the duty to keep out of the way, unless the evidence of fault in the other is clear.

The Governor, 1 Clifford's R. 93, *supra*.

The John Adams, ib. 404, Clifford J., on p. 413.

The Egyptian, 1. Marit. Rep. (Law Times) 358. A strong case, where the Privy Counsel held a vessel liable for a collision, which had done all she could to avoid it, after the danger was discovered.

The Clement, 2 Curtis, 369, *supra*.

The Cuba, II. Marit Rep. (Law Times) 344.

The Neptune (*St. John* v. *Paine*), 10 How. 583.

The Oregon 18 How. 570.

The Genesee Chief, 12 How., at p. 461.

The Pacific (*N. Y. & L. Co.* v. *Rumball*), 21 How.; Clifford, J., at p. 385.

IV. A steamer, in entering a harbor, is bound to great caution. The vigilance is thrown on her. Ordinary care will not excuse her. Steamers, in such instances, have been held in fault for not using precaution, although they may have done their utmost at the time.

The Southern Belle (*Culbertson* v. *Shaw*), 18 How. 587.

The Russia, 3 Ben. Rep., *infra*.

If the night is too dark to distinguish a small vessel in season, a large steamer should not attempt to go down the harbor.

The R. B. Forbes, Sprague, 329.

V. The Supreme Court always holds a steamer responsible for the selection of her course. If she takes an unusual course, or one that involves more risk than another, when she has an election, or voluntarily puts herself in a position where, if a sailing vessel shall happen to come in the way, she cannot avoid her, or cannot do so without extreme measures on her part, she is responsible for the damage. And, in such cases, it is not an excuse to show, that *but for some mere error*, not a fault, in the other vessel, or some accident to her,

the collision *might* not have occurred: it not being made clear that the collision was occasioned by a fault of the other vessel to which the course taken by the steamer did not contribute.

The Isaac Newton (*Crockett* v. *Newton*), 18 How. 281. The fault of the steamer was that, for her convenience and for greater safety to herself, she went into a passage between vessels, without ascertaining whether it was clear. (It was also held that she might have seen the other vessel with due diligence; but this was not the only ground.)

The Southern Belle, 18 How. 584.

Fretz v. *Bull*, 12 How. 4. The steamer had room enough to be differently navigated, but took a course near to the flat-boat; and the eddy brought them unexpectedly in contact. The steamer was condemned.

The Russia, 3 Benedict Rep. 471. The ship Figlia Maggiore was lying at anchor about 400 yards from the Battery in the harbor of New York, tailing down the harbor at half ebb tide. The Cunard screw steamer Russia was coming up the harbor, bound to her dock in Jersey City. She ran into and sank the F. M. Her defence was that she saw the middle and west side of the North River so full of vessels, that she made a turn round by the Battery; and that, when at a proper distance past the F. M., she put her helm to starboard, and would have gone clear, with room to spare, but that a strong eddy seized her, and she would not mind her helm, but swung to starboard, and hit the F. M. It was claimed to be an accident. The Russia introduced pilots and the harbor-master, who testified to the effect of the meeting of the ebb tides from the North and East Rivers at this place, it forming a breakwater and eddy which would turn a vessel to the eastward. It appeared that this was well known, and that the eddy was visible at a considerable distance.

Blatchford, J., said that this evidence condemned instead of excusing the Russia. "In attempting to enter such a tide-rip with a vessel at anchor, as the F. M. was, on her starboard hand, and near her course, she assumed all the risk of avoiding such a vessel." What occurred was not fortuitous, but to be foreseen and guarded against. "To

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The Roanoke (*N. Y. & Va. S.S. Co.* v. *Calderwood*), 19 How 245. This was the case of a schooner going up the James River, keeping on the usual side for such vessels, and a steamer running into her on that side, night dark and rainy, and doubtful if schooner kept a good light. Steamer condemned. Campbell, J., says, "This court has decided that neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished, and conducted with caution, will excuse the steamer for coming into collision with the barge or sailing vessel, when the barge or sailing vessel is at anchor, or *sailing in a thoroughfare out of the usual track of the steam vessel.*"

The Peerless, Vern. Lushington, 30. The opinion was doubtless on the ground that if the Peerless went into a place that might be one of danger to a vessel at anchor, she is liable, although the catching of her chain in the windlass might not be her fault, since it is one of those accidents the happening of which the vessel must allow for.

The Falkland, Browning & Lush. 204. The Navigator was going down channel, close hauled on the port tack, and the Falkland was following on the same tack. The Navigator being under reefed topsails, wore, instead of tacking; and, as she came round, saw the Falkland, but kept on. The F. kept on her course until collision was inevitable, and then starboarded to diminish force. Dr. Lushington and the Trinity masters held that the F. knew the N. was wearing, and should have ported her helm. The Judicial Committee and their nautical assessors held that, if the N. was obliged to wear, as that was an unusual course, she should have seen all clear, and room enough, before she undertook it, and that the fault was originally hers; and, when she saw the F., she should have taken a course to go clear of her, and not obliged the F. to deviate.

The Fyenoord, Swabey, 377. Custom of steamers going up to wharves to keep on north side. The F., for her allowable convenience, to take a custom-house officer on board, went over towards

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The Fyenoord, Swabey, 377. Custom of steamers going up to wharves to keep on north side. The F., for her allowable convenience, to take a custom-house officer on board, went over towards

the south side. Held, that she acted at her own risk, if ill-consequences ensued. The other steamer, the Samson, held also in fault for having loaded inside a coal-hulk, where she was hidden, and could not well see. She came out suddenly, and saw the F. in the way. She was obliged to choose between going forward of the F. and backing on another vessel. She was the cause of her own dilemma. Both in fault.

R.

Result of law and facts.

I. The Java had the usual broad channel, and deliberately elected to go through a narrow passage, very seldom used by screw steamers of her length and draft, for her own convenience solely. In doing this, she took upon herself the risk, if ill-consequences ensued.

II. It is proved, and is substantially admitted by the experts for the claimants, that such a vessel ought not to go through that passage unless the passage was clear; and that she ought not to go there if she knew she was to meet a vessel there.

III. At the place where she ported her helm to go that way, the Java could not see the course inside the school-ship. Still, if she had kept close on the north side of the channel, the course would have been more open to her view. In going through the passage, therefore, she had an election, and chose to keep in the middle of the channel so as to bring her to such an angle with the school-ship that she could not see objects on the other side, or on the starboard bow of the school-ship. She is chargeable with negligence in this election.

IV. The passage inside was hazardous for a screw steamer of her length and draft, in case any craft should be in her way there.

V. It is clear that as soon as she saw the McCloskey, a collision was inevitable. Neither her helm, nor her machinery, nor her ground-tackle, nor all together, could prevent it.

VI. The Java could never be sure that small vessels, tugs, boats, barges and scows, might not come into the passage at any moment.

VII. Of the many hundred passages of the Cunard steamers since the school-ship was moored there, only one or two had been inside. Some large steamers go inside, but not like the Java; and it is to be presumed that they keep on the north side, in order to keep the passage open to view, so that they can both see and be seen.

Therefore, if a small vessel left a wharf in East Boston to go inside, and saw no steamer in view, she was justified in supposing she should not meet one until she got clear of the school-ship. This crossing the stern of the school-ship by a huge screw steamer was a surprise.

VIII. The collision was not inevitable; for there were two other courses open to the Java, in one of which it could not, and in the other probably would not, have occurred.

IX. The Java is *prima facie* in fault, the collision having occurred in fine weather and in broad daylight. No accident disabled her, or put her to disadvantage. Nothing happened that she was not bound to anticipate as possible or probable.

She must make good the damage, unless it appears clearly that the collision was caused by the fault of the schooner.

X. No fault is charged on the schooner. It is only said, that, if her sail had been fully up, she would have been earlier seen by the Java. No one can tell how much earlier, or whether enough so to have affected the result. Besides, it is shown that the Java did see the masts of the McCloskey as they passed along, above the hull of the school-ship.

The McCloskey was neither in fault nor in error in not having her sail fully up. It is natural and usual that a vessel leaving a near dock without sail hoisted, as she was obliged to, should not get her

sail fully up when passing the bow and beam of the school-ship. It was one of the probabilities the Java took the risk of when she went into that passage. The Java was bound to anticipate meeting vessels without masts or sails, or vessels with sails in process of being hoisted.

The suggestion by Judge Lowell that it is like the case of a man driving slowly round a corner where a wall hides everything coming the other way, is answered in the opinion by Judge Shepley. The fallacy is in putting the two carriages on an equality. Also, if one was a hay-cart, with large projections, filling up much of the road, and difficult to manage, and the driver could have gone on the other side of an open space, and so see and be seen earlier, he was in fault.

It would be an outrage to allow the Java, after electing (1) to go by this passage for her own convenience, instead of by the channel, and (2) to keep mid channel, and cross at an angle of 35° to 45°, instead of keeping on the northerly side, and thus having a chance to see inside, — and, after having sunk a schooner, admitting total inability in that place to save her, and proving no fault on the schooner, — to excuse herself by the mere suggestion, that perhaps, if the schooner's sail had been fully up, they might have seen her sooner; leaving it still uncertain whether that would have affected the collision; the possibility of meeting vessels in that condition being one of the things she was bound to have anticipated.

This is not a mere case (as Judge Lowell seems to have thought it) of determining *which side of the stern of a vessel at anchor a steamer shall go.* It is the case of choosing which side of a vessel at anchor to go, with the addition that on one side there would be room to manœuvre, and on the other there would not; and with the further fact that if the Java intended to go inside the school-ship, she should have kept that passage in view a longer time, and herself longer in in view by vessels in that passage.

The school-ship has been, seven months in every year, for ten years, a permanent object, whose buoys and whose course of swing-

ing with the tide were well known to Martin the pilot, and to Moodie the master. She was known to lie just on the edge of the channel, and to be long, and high out of water. It was like the case of a bold rock of that size and height at that place. Her well-known position there compels all vessels to elect whether to keep in the channel, or try the passage left inside of her, necessarily giving her a good berth on the inside, and taking the risk of meeting craft there which may be partly or wholly hidden for a time, and where it is difficult, if not impossible, for a monster screw, like the Java, to go by with safety to herself, the school-ship, and the vessels she meets.

RICHARD H. DANA, JR.,
for the Libellants and Appellees.

Opinion of Judge SHEPLEY, in the Circuit Court; Mr. Justice CLIFFORD concurring.

SHEPLEY, JUDGE.

The libel in this case is brought by the owners of a cargo of linseed, which was shipped on the schooner James McCloskey, and damaged to the extent of about seven thousand dollars in consequence of a collision in Boston harbor, between the schooner and the steamship Java, of the Cunard line.

Libellants claim that "the steamship caused the collision by not seasonably altering her course, and by not seasonably stopping and backing her machinery, and by her unusual and venturous navigation, or by one or more of said faults."

The claimants contend that a good lookout had been kept by the Java during the whole time she was coming up the harbor, that it was impossible for her to discover the schooner sooner than she was discovered, owing to the fact that the school-ship George M. Barnard was interposed between her and the schooner; that immediately upon discovering said schooner, the helm of the Java was put hard to starboard, and her engines were reversed at full speed, and that all that was possible to be done was done aboard the Java to avoid the collision; that at the time of the collision the speed of the steamer was so reduced as not to be equal to that of the schooner drifting with the tide.

They also contend that there was fault on the part of those in charge of the schooner, in allowing her to drift without being under steerage way, and without sail set, and concealed by the ship George M. Barnard, into the way of the steamship; and that if the schooner had been under sail so as to have answered her helm, she might, by putting her helm to starboard, even after the schooner was discovered by the steamship, have avoided the collision.

The answer also claimed exemption of the steamship from liability by reason of her being an inward-bound ship in sole charge of a pilot,

taken on board under a compulsory statute of Massachusetts. This ground of defence was not relied upon in argument, it not being considered an open question in this circuit since the decision in *Camp* v. *Marcellus*, 1 Clifford, 481.

The undisputed facts in the case are that the schooner, between the hours of twelve noon and one of the afternoon, of November seventh, 1866, was towed from one of the wharves in East Boston into the stream, and was getting under way near the school-ship George M. Barnard, having her foresail partly hoisted, when her master saw the Java coming round the stern of the George M. Barnard, heading directly towards the schooner. The schooner's helm was put hard a starboard. The steamer was proceeding very slowly, having stopped her engines a short time before in order to avoid a collision with another schooner which had passed down the harbor inside of the George M. Barnard and ahead of the James McCloskey. Immediately upon seeing the McCloskey, the helm of the Java was put hard to starboard and her engines were reversed, but the steamer struck the schooner abaft of the main rigging and knocked a hole in her, whereby the cargo of linseed was damaged. The weather was clear and fine, with a good breeze from a westerly direction. The tide was from one to two hours' ebb, running from one and a half to two knots an hour. The Java, a propeller steamer of twenty-seven hundred tons burthen, three hundred and sixty feet in length, drawing about nineteen feet of water, was coming up the harbor to her dock in East Boston.

The McCloskey was a fore and aft schooner, one hundred and twenty-one feet long, proceeding down the harbor from her wharf at East Boston.

The school-ship is a large vessel, light, and high out of the water, which during the winter months was kept constantly moored near the East-Boston side of the channel, leaving a large space on the outside between her and Boston, and a comparatively narrow passage on the other side between her and East Boston. Vessels of the size of the Java, rarely take this passage, because they could not pass inside of the school-ship excepting at or near high water. But the evidence shows that, at the state of the tide at the time of the collision, it

would be prudent and safe for a vessel of the size of the Java to go through that passage if it was unobstructed by other vessels.

It is contended on the part of the libellants, that the Java was in fault in coming up as she did to a point about midway of the channel "about abreast the Slate Ledge" and "a little above the Slate-Ledge buoy," before she determined whether to go inside or outside the school-ship, instead of keeping a course up the harbor more nearly parallel with that in which the school-ship was lying, so as to keep open the view of the channel inside the school-ship. But, as well stated by the learned Judge of the district court in his opinion in this case, "whatever direction she had taken, the school-ship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another."

It is also contended that the Java pursued an unsual course in attempting to go to her dock by the passage between the school-ship and the Bird-Island Flats. Much testimony has been taken in the case upon the frequency of the use of this passage by steamers of the class of the Java, and there is much conflict in the testimony. But it becomes comparatively immaterial in this case in the view we take of it, for two reasons: First, a vessel is not to be considered in fault merely because she takes, for reasons of her own convenience or necessity, an unusual course; but when there is an usual and an unusual course, the vessel taking the unusual course for her convenience does it at her peril, and is bound to see that she does it in safety.

The Fyenoord, Swabey.
The Peerless, Lushington.
The Falkland, Br. v. Lushington.
The Roanoke, 19 Howard.

Secondly — The collision might and would have happened as it did had the school-ship been anchored in any other place, provided the relative positions of the three vessels in reference to each other had been the same.

It therefore seems properly to resolve itself into a consideration of the duties and liabilities of a steamship running under the stern of a

vessel at anchor, at an acute angle, considered in reference to the possibilities and probabilities of a small sailing vessel passing at the same time behind the vessel at anchor, which was so large and high out of water as to intercept the view of a small schooner, tug boat or flat boat in a channel or passage much frequented by small vessels.

It is urged that the steamer under these circumstances proceeded very slowly and with a vigilant lookout, and therefore as the schooner was not seen from the steamer in season for those in charge of the steamer to avoid the schooner, the collision must be considered in the light of an inevitable accident.

But it seems very difficult to apply the term inevitable accident to a collision occurring under such circumstances, at midday and in fine weather. The steamer was not disabled, and nothing happened which she was not bound to anticipate as possible at least, if not probable.

A collision is properly regarded as the result of inevitable accident "which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent its occurrence."

Union S.S. Co. v. *Va. S.S. Co.*, 24 Howard, 313.

"If," says Dr. Lushington in the *The Plato* v. *The Perseverance*, "the accident could have been avoided by ordinary skill, diligence and precaution, then it is not an inevitable accident."

There is always a period of time before the actual collision when it is inevitable — when skill, diligence and precaution are unavailing — because too late.

"Precautions," says Mr. Justice Clifford in the case of *The Governor*, 1 Clifford 93, "must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity for precautionary measures was not perceived until it was too late to render them availing."

The school-ship for many years had been constantly, during the winter months, kept moored in the same position near the edge of the channel. She was large and high out of water. The pilot of

the Java knew her position, and that the view of a small sailing vessel might be shut out by the school-ship.

The steamer was bound to guard against the emergency. If she went under the stern of the school-ship at an acute angle under such circumstances, she was bound by law to proceed so slowly and with so much vigilance that she could keep out of the way of a sailing vessel. Any degree of speed or any want of vigilance which left her powerless to prevent a collision with a sailing vessel after it was seen, which she had a right to expect to meet in the position in which it was first seen, was a want of seasonable and proper precaution, and therefore a fault.

It is said a man may drive round the corner of a road, if that is the most convenient way home, though he ought to do it slowly and with more than ordinary care if he cannot see what is on the other side. But suppose one man is driving round the corner of a road where the view is obscured by a high wall or building, and has reason to suppose that there may be coming round the corner in an opposite direction another who has a paramount right of way, who has a right and is under obligation to keep his course while the first man is bound to keep out of his way. Would not this case better illustrate the relative positions of a vessel under steam and one under sail under such circumstances, and in each case would there not exist an obligation to see a clear course before proceeding?

Although, in the case of *The Isaac Newton*, 18 Howard, 581, the sails of the schooner were hoisted so as to have been visible over the hull of the vessel at anchor, and, in that respect it is distinguishable from the present case, yet the decision was placed by the court on the ground that the attempt of the steamer to come to her landing between vessels at anchor without first ascertaining that the track was clear, was culpable, and on that ground she was condemned in damages.

If the night be too dark to distinguish a small vessel in season, a large steamship should not attempt to go down the harbor.

The R. B. Forbes, 1 Sprague, 329.

It is not easy to see why the principle is not the same whether the

view be intercepted by any large object at rest, or obscured by darkness.

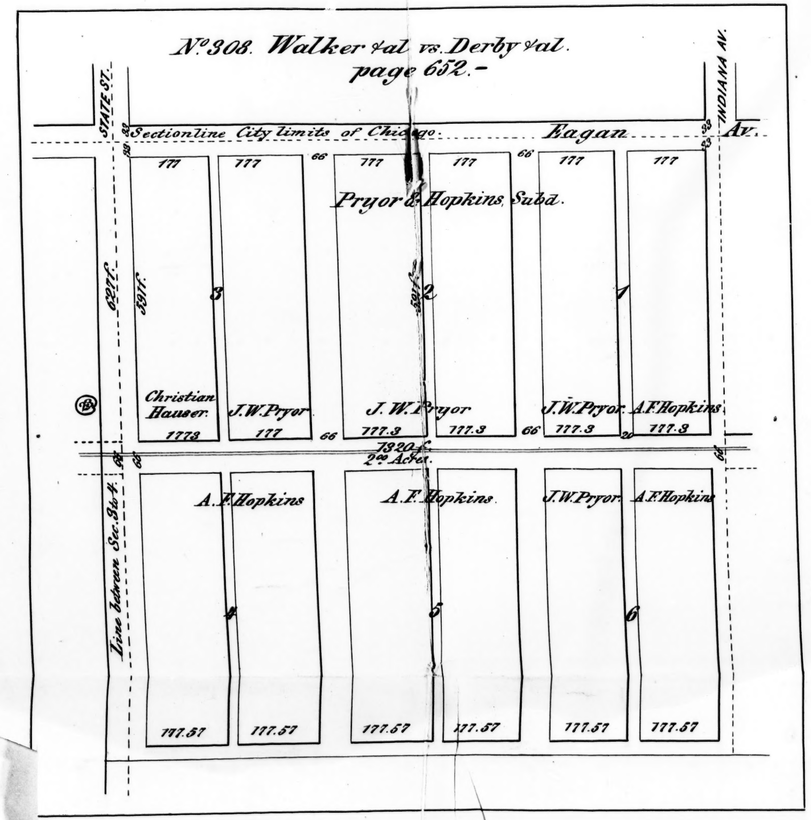
To hold the steamer free from fault under these circumstances, would be to relax the rule well settled in the decisions of the courts of the United States, introducing conflict where there is now uniformity of decision, and establishing a precedent which might lead to danger.

The Oregon, 18 How. 570.
St. John v. *Paine et al.*, 10 How. 583.
The Genessee Chief, 12 " 461.
S.S. Co. v. *Runball*, 21 " 392.
The Carroll, 8 Wall, 302.
The Rapid, opinion of Blatchford, J., U.S. Court, S. Dist. of N. York (not reported).

The Java voluntarily, and for her own allowable convenience, placed herself in a position where, meeting a small vessel in a place not unusual and where such a meeting might reasonably have been expected, the Java could do nothing by her machinery, her anchors or her helm to avoid the collision.

We do not perceive that any fault is fairly imputable to the schooner. She came from the dock without her sails being set, because they forced her against the wharf. She obtained the assistance of a tug to pull her out into the stream, and with the aid of the tug and the tide came down rapidly to the vicinity of the school-ship, and was setting her foresail and had it from half to two thirds up when she saw the Java. There is no sufficient proof of any unusual or negligent delay in hoisting the sails, or of her being in fault in any other respect.

Decree of the district court reversed. Decree to be entered for libellants. Case to be referred to a master to assesss the damages.


No 308. Walker et al vs. Derby et al.
page 652.-
STATE ST.
Sectionline City limits of Chicago.
Hagan
INDIANA AV.
Pryor & Hopkins Subd.
Christian Hauser.
J.W.Pryor
J.W.Pryor
J.W.Pryor
A.F.Hopkins
7320 L.
2.94 Acres.
Line between Sec. 34-4
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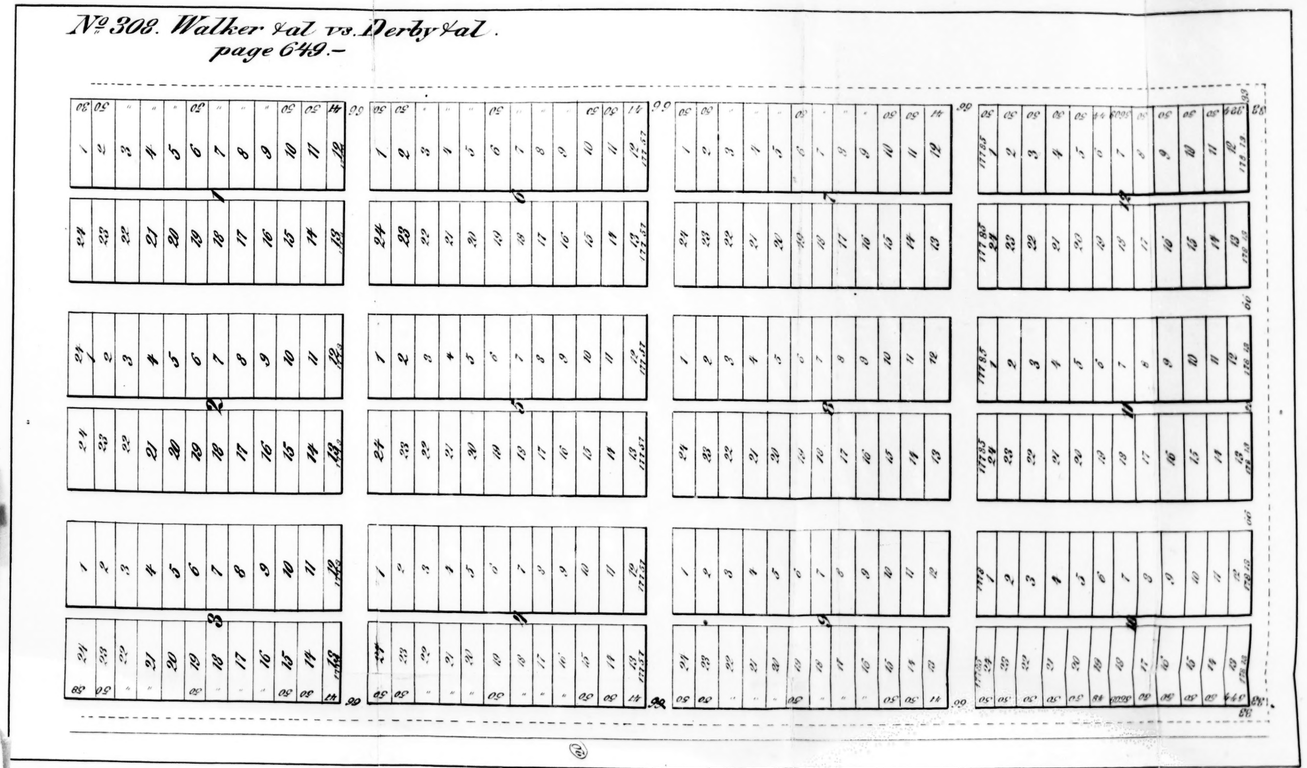
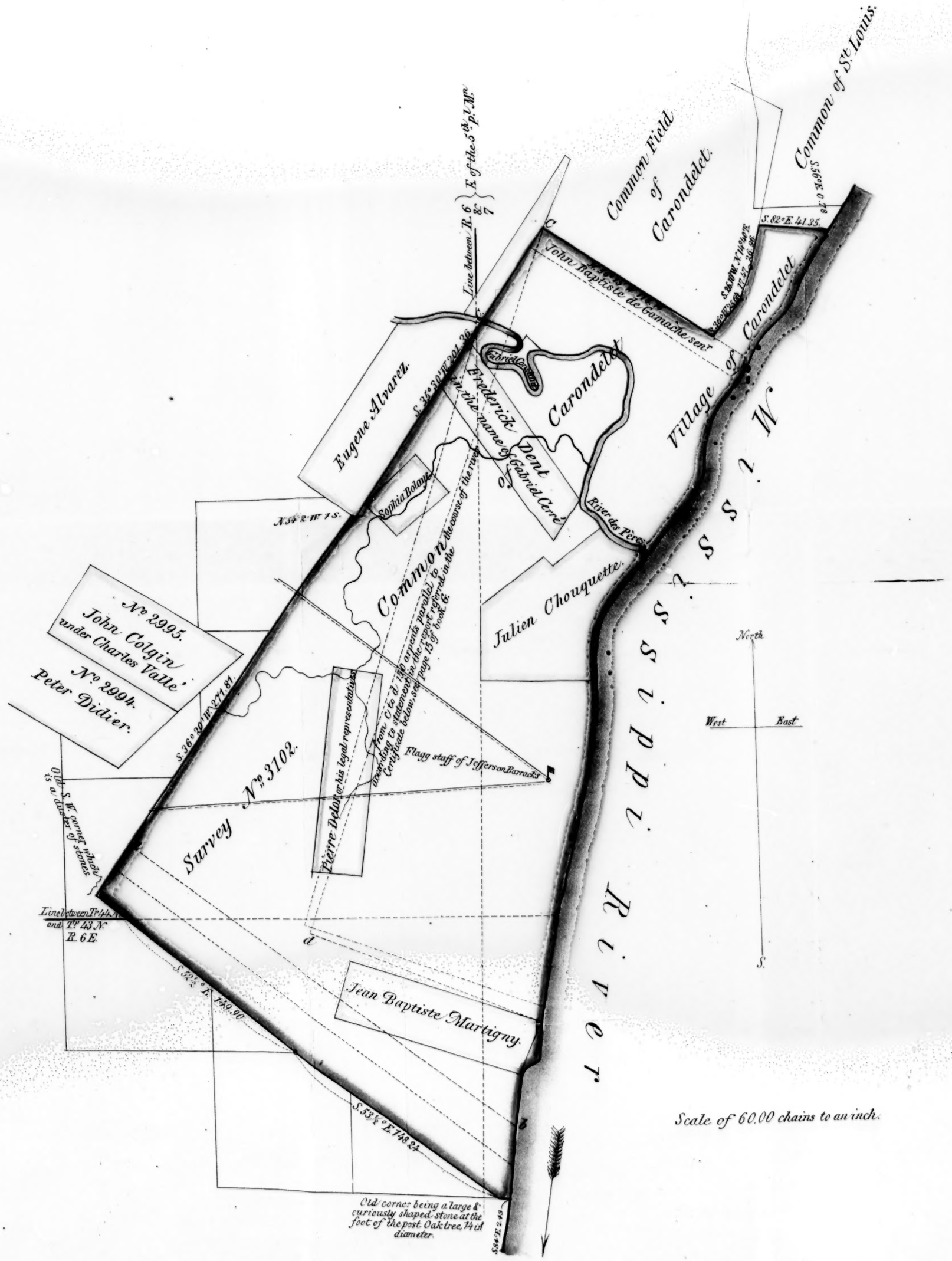
J.W.Pryor
A.F.Hopkins


No 308. Walker et al vs. Derby et al.
page 649.-

No. 324. Dent vs. Emmeger & al
Page 17

X.

Ts. 43 & 44 N. Rs. 6 & 7 E of the 5th pl. Mn.


Line between R. 6 & 7 E of the 5th p.l. Mn
Common Field of Carondelet.
Common of St Louis.
S. 69° E. 0.78
S. 82° E. 41.35.
S. 84° W. 17 links E. 36.96
John Baptiste de Gamache sen.r
Carondelet
Village of Carondelet
Gabriel Cerré
Frederick Dent in the name of Gabriel Cerré
Eugene Alvarez
S. 35° 30' W. 201.36
Sophia Bolaye
N. 54 2 W. 7 S.
River des Pères
Common the course of the river
Julien Chouquette.
No. 2995. John Colgin under Charles Valle'
No. 2994. Peter Didier.
S. 36° 30' W. 271.81.
From C to d 150 arpents parallel to according to statement in the report referred in the Certificate below. See page 15 of book G.
Flagg staff of Jefferson Barracks
Survey No. 3102.
Pierre Delor or his legal representatives
S. W. corner which is a distance of stones
Line between Tp 44 N. and Tp 43 N. R. 6 E.
Jean Baptiste Martigny.
S. 52 3/4° E. 149.90
S. 53 1/4° E. 148.24
Old corner being a large & curiously shaped stone at the foot of the post Oak tree, 14 in diameter.
S. 84 E. 2.43
North
West
East
S.
Mississippi River

Scale of 60.00 chains to an inch.

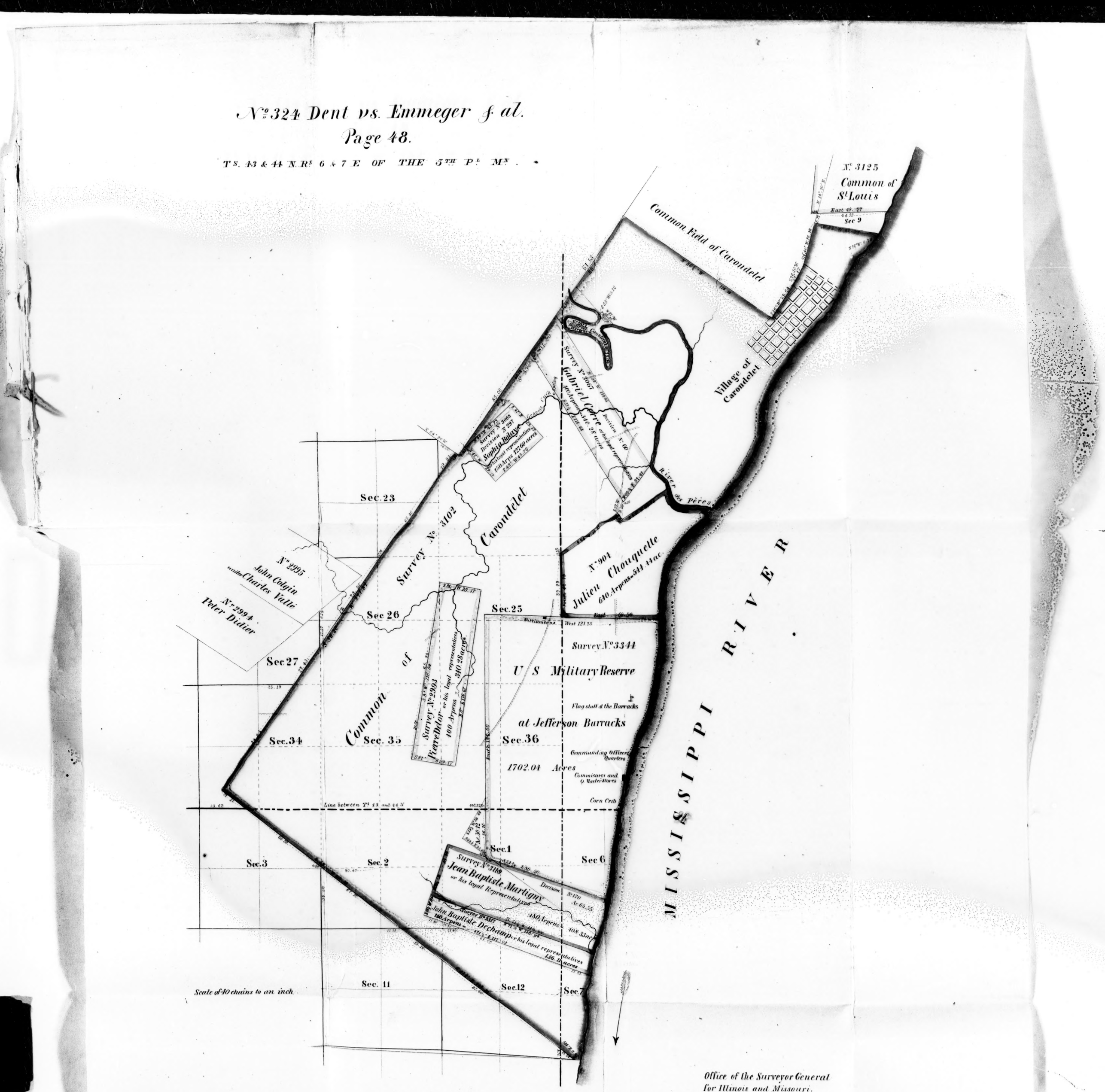
Office of the Surveyor General for Illinois & Missouri
St Louis, May 24th 1854.

I certify that the above is a correct copy of the Diagram marked X, which accompanied the Surveyor General's report to the Commissioner of the General Land Office, dated the 15th April 1840 in relation to the claim and Survey of the Common of Carondelet, as it is found of record on page 82 of letter book G in this Office.

Jno. Loughborough
Surveyor General.

No. 324 Dent vs. Emmeger & al.
Page 48.

TS. 43 & 44 N. RS. 6 & 7 E OF THE 5TH PL MN.



Office of the Surveyor General
for Illinois and Missouri.
St Louis, October 8th 1855

The above plat of Survey No. 3102 in Townships 43 & 44 North of the base line and Ranges 6 & 7 East of the 5th principal Meridian, of the tract of Land confirmed to the Inhabitants of the Village of Carondelet by the first Section of the Act of Congress approved the 13th of June 1812, entitled 'An act making further provision for settling the claims to land in the Territory of Missouri' and showing the connections of that Survey with the lines of the adjoining public and private Surveys is strictly conformable to the field notes thereof on file in this office which have been examined and approved. It was originally executed about the year 1817 by Elias Rector, Deputy Surveyor, whose field notes are not dated, and its lines where subsequently retraced between the 11th and 17th days of March 1834 by Joseph C. Brown, Deputy Surveyor, under instructions of the 10th of the same month from Elias T. Langham Surveyor of the public lands for the District of Illinois and Missouri.

The said Survey is retraced by the said Brown was sanctioned by the decision of the Hon. R.M.ᶜ Clelland, Secretary of the Interior dated the 23d of February 1855, which decision was transmitted to this office for its information and government, and pursuant to said decision there is hereby made a distinct and unqualified exclusion from the said Survey No. 3102 of Survey No. 3344 executed to the amount of 1702.04 acres (as shown by the field notes furnished this Office on the 28th March 1855 by the Commissioner of the General Land Office) on the 3d December 1840 by Geo. W. Waters under direction from the War Department of the **Military Reserve at Jefferson Barracks** as the absolute property of the United States set apart for their own Special use and in exclusion from any laws for the disposal of the public domain, and in further pursuance of said decision it is hereby declared that as regards the rights of all other claimants within the limits of said Survey No. 3102 who hold adversely to Carondelet, this approved plat is in no manner intended, nor shall it be construed, to interfere with the rights of such adverse claimants to seek a judicial settlement of their several interests

Office of U.S. Recorder of Land Titles
St. Louis 1st April 1870.

The above plat of Common of Carondelet and Certificate of approval thereof are correctly copied from Page 47 of a Plat Book entitled and known as Miscellaneous Plats on file in this Office.

Albert Siegel, U.S. Recorder of Land Titles

U. S. Int. Rev. Stp. 5 Cents

(SIGNED) Jno. Loughborough
Surveyor General